Supreme Court, U.S.
FILED
AUG 14 2000

No. 00-258

In The

# Supreme Court of the United States

ANTHONY FLETCHER,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Pennsylvania Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

JEROME J. SHESTACK*
JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

*Counsel for Petitioner, Anthony Fletcher*

*Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

109 PP

## (CAPITAL CASE)
## QUESTIONS PRESENTED

1. Whether the trial court violated Petitioner's constitutional right to testify and present a defense at the capital sentencing hearing by: (a) first, admitting testimony for the prosecution that the Petitioner shot the decedent in a confrontation over a drug dispute; (b) next, forbidding the Petitioner, by order *in limine*, from testifying that he confronted the decedent about money the decedent stole during a craps game, or from offering any other evidence to controvert that the shooting was drug-related; and (c) then, sentencing the Petitioner to death based on the "aggravating" factor under Pennsylvania law that the killing was drug-related?

2. Whether the trial court violated Petitioner's Sixth Amendment right to confront the witnesses against him by admitting, absent any indicia of reliability, the decedent's alleged out-of-court statement that the Petitioner was motivated to kill him over a drug dispute?

3. Whether the Petitioner's Fifth Amendment and Due Process rights were violated when the prosecutor, knowing that the Petitioner was forbidden from testifying about the circumstances of the alleged crime, argued that the jury should not bestow mercy because of the Petitioner's failure to explain the crime and express remorse?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

A. Factual Background ..... 2

B. The State Court Rulings ..... 7

1. Restricting Petitioner's Testimony ..... 7

2. Admission of Decedent's Alleged Out-of-Court Statement ..... 8

3. The Prosecution's Argument on Lack of Remorse and Mercy ..... 9

REASONS FOR GRANTING THE WRIT ..... 9

I. THE STATE COURT COMMITTED GRAVE CONSTITUTIONAL ERROR, WARRANTING THIS COURT'S REVIEW, BY FORBIDDING FLETCHER FROM TESTIFYING THAT THE KILLING WAS NOT DRUG-RELATED, ALLOWING THE PROSECUTION TO PRESENT TESTIMONY THAT THE KILLING WAS DRUG-RELATED, AND THEN SENTENCING FLETCHER TO DEATH BASED ON THE JURY'S FINDING THAT THE KILLING WAS DRUG-RELATED ..... 10

TABLE OF CONTENTS – Continued

Page

II. THE PENNSYLVANIA COURT'S MISUSE OF THE "STATE OF MIND" EXCEPTION TO THE HEARSAY RULE RAISES AN IMPORTANT ISSUE UNDER THE CONFRONTATION CLAUSE, WARRANTING REVIEW BY THIS COURT ..... 13

A. The Confrontation Clause Ensures the Reliability of Statements Used Against the Defendant by Requiring Adversarial Testing in Court ..... 14

B. The Trial Court's Overextended Application of the "State of Mind" Exception Does Not Qualify as a "Firmly Rooted Exception" to the Hearsay Rule ..... 16

C. The Commonwealth Never Demonstrated Any "Particularized Guarantees of Trustworthiness" ..... 18

D. The Trial Court's Violation of The Confrontation Clause Constitutes Reversible Error ..... 19

III. THE PROSECUTION VIOLATED FLETCHER'S RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY ARGUING THAT FLETCHER SHOULD BE SHOWN NO MERCY BECAUSE HE FAILED TO EXPLAIN THE MOTIVES AND REASONS FOR HIS CONDUCT, EVEN THOUGH THE TRIAL COURT FORBADE HIM FROM DOING SO ... 20

A. The Prosecutor's Comment on Fletcher's Failure to Explain the Circumstances of the Crime Violates Due Process ..... 21

TABLE OF CONTENTS – Continued

Page

B. The Prosecutor's Comment on Fletcher's Failure to Express Remorse Violates Fletcher's Fifth Amendment Right Against Self-Incrimination ..... 22

C. The Prosecutor's Comments Appealed to Vengeance in Violation of Fletcher's Right to Due Process of Law ..... 23

CONCLUSION ..... 25

# TABLE OF AUTHORITIES

Page

CASES

*California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987) ..... 24

*Commonwealth v. Appel*, 539 A.2d 780 (1988) ..... 8

*Commonwealth v. Fletcher*, 750 A.2d 261 (Pa. 2000) ..... 1

*Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986) ..... 12, 13

*Crawford v. U.S.*, 212 U.S. 183, 29 S. Ct. 260, 53 L.Ed. 465 (1909) ..... 11

*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976) ..... 21

*Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1020, 106 S. Ct. 3333, 92 L.Ed.2d 738 (1986) ..... 25

*Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981) ..... 23

*Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976) ..... 24

*Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965) ..... 22, 23

*Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990) ..... 15, 19

*Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999) ..... 15, 16, 18

*Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965) ..... 15

TABLE OF AUTHORITIES – Continued

Page

*Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987) ..... 10, 11

*Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L.Ed. 196 (1933) ..... 17

*Tuggle v. Netherland*, 516 U.S. 10, 116 S. Ct. 283, 133 L.Ed.2d 251 (1995) ..... 11

STATUTES

18 Pa. C.S. § 2502(a) ..... 5

42 Pa. C.S. § 9711(d)(14) ..... 5, 6, 8

## PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner Anthony Fletcher prays that this Court issue its Writ of Certiorari to review the decision of the Supreme Court of Pennsylvania rendered March 24, 2000.

## OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania was filed on March 24, 2000 and is reported at *Commonwealth v. Fletcher*, 750 A.2d 261 (Pa. 2000), *rearg. den.*, May 15, 2000. The opinion is attached here in the *Appendix ("App.")* at 1a-38a, and the denial of reargument is also attached, *App.* at 39a.

## JURISDICTION

The Supreme Court of Pennsylvania rendered its decision on March 24, 2000, the Petitioner timely moved for reargument on April 4, 2000, and the Supreme Court of Pennsylvania denied reargument on May 15, 2000. Petitioner timely files this Petition on August 14, 2000, ninety days after May 15, 2000.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . ;

the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor[;]

and the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any state deprive any person of life, liberty or property without due process of law . . . .

## STATEMENT OF THE CASE

### A. Factual Background

This capital case arises from the 1992 shooting of a 26-year-old male at 1:00 a.m. outside a crack house in Philadelphia. *App.* at 3a. In a statement to police, Petitioner Anthony Fletcher said he got into a scuffle with the decedent, Vaughn Christopher, over some money Christopher earlier robbed from him after a craps game. *App.* at 4a. In the midst of the scuffle, Fletcher said, Christopher pulled a gun and then, in the ensuing struggle over the gun, was shot twice. *Id.* The autopsy report shows that Christopher had gunshot wounds to his thigh and lower right flank. *App.* at 56a-57a. He had cocaine in his blood from recent ingestion. *App.* at 58a.

The prosecution's theory was that Fletcher walked up to Christopher, pulled a gun and shot him execution-style

over a botched drug deal. During the guilt phase of the proceedings, the sole witness the prosecution offered for its posited version of the incident was Natalie "NeNe" Grant, an admitted crack addict who had six outstanding bench warrants at the time of trial. *App.* at 50a-51a.

According to the prosecution, Fletcher's motive was to even the score after Christopher smoked a package of crack fronted by Fletcher instead of selling it and using the money to pay Fletcher. At closing argument in the guilt phase, the prosecutor argued that Fletcher's alleged motive provided compelling reason to convict:

> What the case is about, what the motive is about, when you are in that situation, when someone messes up a package on you, you make a mistake to give an addict something to sell and unfortunately their addiction gets the best of them. You can't go to small claims court to say I want to sue you for my money back because how can you tell a judge that he owes you money from drugs? . . . See, that's what the word on the street was, that Anthony didn't do anything about the fact that Vaughn [Christopher] beat him for his package, beat him for his money and you can't be running no kind of business when the word on the street is he ain't going to do nothing about it, someone took him and he is not going to do nothing about it. He has to get the word out on the street. *That is why the case is so overwhelming.*

*App.* at 59a (emphasis added).

But the prosecution had no evidence that Fletcher was involved with Christopher in drug dealing, or that Fletcher fronted Christopher a package of cocaine, or that Christopher smoked the package instead of selling it, or

that Fletcher shot Christopher in retaliation. No evidence, that is, except alleged out-of-court statements attributed to Christopher, which were admitted into evidence at trial for the truth of the matter asserted despite Christopher's obvious inability to appear for cross-examination. At the guilt phase of the trial, the only evidence in the record of the alleged drug-related motive was double hearsay, in the form of a written statement the police supposedly took from Ronald "Skeet" Williams. *App.* at 3a. According to the written statement, Williams said that Christopher said that "he had fucked up a package of dope that belonged to [Fletcher]." At trial, Williams denied that he ever made the statement to police. He said he signed the written statement under pressure, without reading it. *Id.*[1]

The prosecution also tried to present testimony from Natalie "NeNe" Grant about Fletcher's alleged motive. Grant offered to testify that Christopher told her a few days before the shooting that he mishandled a package of drugs for Fletcher, and to give her opinion that the botched transaction was the reason for the killing. *App.* at 52a-53a. The trial judge struck Grant's testimony as hearsay (even though he had earlier admitted the double hearsay rendition of Christopher's alleged comment). *Id.*

---

[1] The Pennsylvania Supreme Court ultimately ruled that Williams' alleged written statement recounting Christopher's alleged oral statement was admissible under the "state of mind" exception to the hearsay rule, to show "the victim's state of mind regarding his relationship with [Fletcher]." *App.* at 22a.

At the close of the guilt phase, the trial judge gave the jury his opinion in his final instructions that Fletcher killed Christopher over a botched drug deal:

> I guess the evidence in this case, and you make your own determination, was that there was a motive, a drug-related transaction in which the deal didn't go through and I guess they talked about the delivery of the cocaine, smoking of the cocaine by the deceased, so I guess you can label that motive money, revenge.

*App.* at 61a. The jury then convicted Fletcher of first-degree murder under 18 Pa. C.S. §2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.").

The prosecution then successfully used Fletcher's alleged motive at the capital sentencing hearing to obtain the death penalty. *See* 42 Pa. C.S. §9711(d)(14) (identifying as a statutory aggravating factor that "the killing resulted from or was related to that association, involvement or competition [between the defendant and decedent] to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.").[2] At the sentencing

---

[2] The other aggravating factor was that Fletcher purportedly endangered other people in addition to the decedent because they were milling around outside the crack house when the shooting occurred. *See* 42 Pa. C.S. § 9711. The jury also found two mitigating factors: (1) that Fletcher acted under the influence of extreme mental or emotional disturbance; and (2) "other evidence of mitigation concerning the character and record" of Fletcher "and the circumstances of his offense." *App.* at 1a-2a. But, after three days of deliberation,

hearing, the trial judge again allowed the prosecution, over objection, to introduce the alleged out-of-court statement that Christopher mishandled drugs for Fletcher. This time the alleged out-of-court statement was recounted by prosecution witness Angelic "Poochie" Kirkman, who said she heard Christopher say it while she was getting high on crack. *App.* at 62a-63a.

Fletcher, who did not testify during the guilt phase, took the stand in his defense at the capital sentencing hearing. The trial court specifically forbid him, by an order *in limine*, from testifying that he did not kill Christopher over a drug dispute, even though this drug-related motive was one of the two aggravating factors to be adjudicated at the hearing. The trial court's rationale, as explained in its ruling on post-trial motions, was as follows:

> This court did not err in forbidding the defendant from presenting evidence regarding his claim that this shooting occurred due to a gambling debt [sic]. Of course, a defendant may testify at the penalty phase on matters relevant to mitigation; however, a defendant cannot testify to exculpate himself from the prior verdict of guilt of murder of the first degree . . . . In this case, the defendant's testimony regarding his version of the events of this homicide constituted an attempt to exculpate him from his previously discussed criminal culpability for a first-degree murder.

*App.* at 70a.

---

the jury found that the aggravating factors outweighed the mitigating factors and voted to impose the death sentence. *Id.*

Notwithstanding the fact that the trial judge forbid Fletcher from giving "his version of the events of this homicide," the prosecutor argued in his closing remarks that Fletcher's failure to explain his motive for the shooting and his failure to express remorse were further reasons to impose the death penalty:

> Frankly, I don't think this is the time for mercy. I think that time is long since past and the defendant has not really acted out of a request for mercy, in that when he was arrested, he had a chance to tell Detective Dougherty what happened and if he wanted mercy, that was the time to ask for mercy. When he took the stand yesterday and had people testify on his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse of his killing of Vaughn Christopher because of drug involvement, he would have told you; he would have admitted it like a man and he would have, at that time, asked you for mercy. But, that has never happened in this case, so, I submit to you, the time for mercy has long since past [sic].

*App.* at 64a.

**B. The State Court Rulings**

**1. Restricting Petitioner's Testimony**

The substance of the trial court's order *in limine* preventing the Petitioner from testifying at the sentencing hearing about the circumstances of the shooting is set forth in the Appendix, as is the Petitioner's challenge to that ruling. *App.* at 66a-67a, 74a. The trial court denied a motion for new trial challenging its order *in limine* on

May 13, 1997. *Id.* The Petitioner appealed the order *in limine*, among other issues, by full briefing to the Supreme Court of Pennsylvania. *Id.* at 68a, 70a. In its written opinion following the appeal, the Pennsylvania high court ruled that the "limitation was proper," because the excluded testimony would have suggested "that [Fletcher] was not guilty of the murder for which he had just been convicted." *App.* at 25a.

### 2. Admission of Decedent's Alleged Out-of-Court Statement

The trial court admitted the decedent's alleged out-of-court statement that he had consumed rather than sold a package of drugs fronted by the Petitioner as evidence of motive. *See App.* at 50a-51a. The Supreme Court of Pennsylvania rejected the Petitioner's challenge to the evidence as inadmissible hearsay through its Opinion and Order of March 24, 2000, finding it admissible under the "state of mind" exception. *App.* at 7a-8a. On April 4, 2000, the Petitioner filed a motion for reargument challenging the Court's application of the "state of mind" exception based on the Confrontation Clause of the Sixth Amendment.[3] *App.* at 76a-77a. The Supreme Court of Pennsylvania

---

[3] The Pennsylvania Supreme Court also implicitly considered and resolved the Confrontation Clause issue in adjudicating the original appeal. *See,* 42 Pa. C.S. § 9711(h)(3)(i) (requiring court to review the entire record to determine if capital sentence is the result of "passion, prejudice, or any other arbitrary factor"). *Commonwealth v. Appel*, 539 A.2d 780, 781, 783 (1988) (acknowledging the Supreme Court of Pennsylvania's obligation to review the entire record for "all possible bases for overturning the conviction or the sentence.").

denied re-argument by Order dated May 15, 2000. *App.* at 39a.

### 3. The Prosecution's Argument on Lack of Remorse and Mercy

During the closing arguments in the penalty phase, the prosecution argued that the jury should show no mercy because the petitioner expressed no remorse and did not explain his motives and intentions, even though the prosecutor knew that the trial court barred Fletcher from discussing the circumstances of the offense. *App.* at 64a. The Petitioner specifically cited this improper argument in his appeal to the Supreme Court of Pennsylvania. *App.* at 70a. The Pennsylvania High Court ruled that "[t]he statements were not inflammatory or prejudicial under the circumstances." *App.* at 33a.

## REASONS FOR GRANTING THE WRIT

This case is rife with interlocking constitutional error borne of the prosecution's attempt to make this a case about a drug-motivated killing without any admissible evidence to prove it. First, Petitioner's Sixth Amendment right to confrontation was violated when the trial court repeatedly admitted, absent any indicia of reliability, the decedent's alleged out-of-court statement that the Petitioner was motivated to kill him over a drug dispute. Second, the Petitioner's right to present a defense was violated by the trial court's order *in limine* precluding him from testifying in his own defense to rebut the prosecution's allegation that the killing was drug-motivated.

Third, the Petitioner's Fifth Amendment and Due Process rights were violated when, in closing argument at the sentencing phase, the prosecutor commented on the Petitioner's failure to rebut the testimony that the killing was drug-related and urged the jury to interpret the Petitioner's silence as a lack of remorse. This Court should grant Petitioner's writ and redress these constitutional wrongs.

## I. THE STATE COURT COMMITTED GRAVE CONSTITUTIONAL ERROR, WARRANTING THIS COURT'S REVIEW, BY FORBIDDING FLETCHER FROM TESTIFYING THAT THE KILLING WAS NOT DRUG-RELATED, ALLOWING THE PROSECUTION TO PRESENT TESTIMONY THAT THE KILLING WAS DRUG-RELATED, AND THEN SENTENCING FLETCHER TO DEATH BASED ON THE JURY'S FINDING THAT THE KILLING WAS DRUG-RELATED

The accused in a criminal case has a constitutional "right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987) (trial court committed reversible error by imposing *per se* bar on portions of defendant's testimony that were hypnotically refreshed, where testimony was necessary to show shooting was in self-defense).[4] "In fact, the most important witness for the defense in many criminal cases is the defendant himself."

---

[4] That right is based on the Compulsory Process Clause of the Sixth Amendment, the Privilege Against Self-Incrimination in the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment. *Rock*, 483 U.S. at 51-53, 107 S.Ct. at 2709-2710.

*Id.* A trial court may not bar the accused from taking the stand, or "arbitrarily exclude[ ] material portions of his testimony." *Id.* at 55, 2711. Whenever motive is at issue in a criminal trial, the accused's testimony as to his motive is material and must be admitted. *Crawford v. U.S.*, 212 U.S. 183, 202-03, 29 S.Ct. 260, 267, 53 L.Ed. 465 (1909) (where prosecution claimed intention to destroy evidence, trial court committed reversible error by forbidding defendant from testifying as to his intent in taking correspondence from corporate files). Exclusion of material portions of a defendant's testimony is undeniably reversible error unless the prosecution proves the error harmless beyond a reasonable doubt. *Id.*

After forbidding Fletcher from testifying that the killing was not drug-related, and allowing the prosecution to present testimony that it was, the trial court sentenced Fletcher to death based upon the statutory aggravating factor that the killing was drug-related. Fletcher was the only person who could say what his own intentions and motives were in his altercation with the decedent. The trial court's ruling left him defenseless to rebut the aggravating factor that the killing was in retaliation for a botched drug deal.[5] It is difficult to imagine a clearer or

---

[5] In states like Pennsylvania in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances to determine whether to impose the death penalty, a death sentence must be set aside if any of multiple aggravating factors is found invalid, as long as the jury found at least one mitigating factor. *Tuggle v. Netherland*, 516 U.S. 10, 11, 116 S.Ct. 283, 284, 133 L.Ed.2d 251 (1995). Here, the jury found two mitigating factors. *App.* at 1a-2a.

more prejudicial violation of the defendant's constitutional rights to present a defense and testify on his own behalf.

The trial court's rationale for restricting Fletcher's testimony, which was affirmed by the Pennsylvania Supreme Court, is illogical and groundless. The court suggested that if Fletcher testified at the sentencing hearing that he confronted Christopher over money Christopher robbed from him after a craps game, rather than over a botched drug deal, his testimony would contradict and relitigate the jury's finding of first-degree murder. *App.* at 70a. That suggestion is unfounded because the general first-degree murder statute under which Fletcher was convicted simply requires a finding that the homicide was an "intentional killing;" it does not include as an element any connection to drug dealing. *See* 18 Pa.C.S. §2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing."). The jury did not make any finding as to motive by way of its guilty verdict. Fletcher's proffered testimony would have, however, directly controverted one of the two aggravating factors that led to his death sentence. Accordingly, the trial court's arbitrary restriction on Fletcher's testimony violated his constitutional right to present a defense. *See Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (reversible error to exclude evidence of coercive setting of interrogation when the defendant was attempting to discredit his confession at trial, despite trial court's rationale that the confession was already found voluntary at suppression hearing).

Furthermore, the trial judge did not apply his contrived reasoning in an even-handed way. To the contrary, he allowed the prosecution to "relitigate" the alleged drug-related motive by proffering the testimony of Angelic "Poochie" Kirkman at the sentencing hearing. Her testimony recounted the decedent's alleged out-of-court statement about mishandling drugs received from Fletcher. Fletcher was then forbidden from rebutting the allegation through his own testimony. "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing'." *Crane*, 476 U.S. at 690-91, 106 S.Ct. at 2147. This misguided ruling on an issue of grave constitutional significance warrants review by the Court.

## II. THE PENNSYLVANIA COURT'S MISUSE OF THE "STATE OF MIND" EXCEPTION TO THE HEARSAY RULE RAISES AN IMPORTANT ISSUE UNDER THE CONFRONTATION CLAUSE, WARRANTING REVIEW BY THIS COURT

In affirming Fletcher's murder conviction and death sentence, the Pennsylvania Supreme Court held that the trial court properly admitted the decedent's alleged out-of-court statement "that he had fucked up a package of dope that belonged to [Fletcher]"[6] under the "state of

---

[6] The decedent's statement was allegedly made to trial witness Ronald "Skeet" Williams, and was offered at trial through a signed statement that Williams allegedly gave to the police. At trial, Williams denied that the decedent made the statement about the drug package, and asserted that he signed

mind" exception to the hearsay rule to show "the victim's state of mind regarding his relationship with [Fletcher]." That out-of-court statement was used as evidence of motive to convict Fletcher, as well as to establish an aggravating factor necessary to impose the death penalty.

The Pennsylvania high court's overextended interpretation of the "state of mind" exception to the hearsay rule, to include the declarant's recollection of past events, violates the Confrontation Clause of the Sixth Amendment when applied in criminal cases.[7] If its ruling in this case is allowed to stand, it will cause lower courts to commit constitutional error in routine hearsay rulings and render scores of future convictions vulnerable on direct and collateral review. This Court should grant Fletcher's writ of certiorari to correct the constitutional errors in this case and pre-empt future Confrontation Clause violations.

### A. The Confrontation Clause Ensures the Reliability of Statements Used Against the Defendant by Requiring Adversarial Testing in Court

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused

---

the written statement while under pressure from the police, but without reading it. *App.* at 21a-23a.

[7] In a concurring opinion, three Justices of the Supreme Court of Pennsylvania disagreed with the majority's interpretation of the "state of mind" exception, stating that they would "not permit the state of mind of exception to be employed, as it is here, to support the general admission of a statement of memory or belief about a past event, as traditional hearsay dangers of fabrication, faulty memory and incorrect narration are implicated by such use." *App.* at 36a-37a.

shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. It applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). As this Court has stated, the central concern of the Confrontation Clause is to ensure the reliability of evidence against the accused by subjecting it to testing in the context of an adversary proceeding before the trier of fact. *Lilly v. Virginia*, 527 U.S. 116, 123-124, 119 S.Ct. 1887, 1894, 144 L.Ed.2d 117 (1999). In *Lilly*, this Court noted that "[w]hen the government seeks to offer a declarant's out-of-court statements against the accused, and . . . the declarant is unavailable, courts must decide whether the [Confrontation] Clause permits the government to deny the accused his usual right to force the declarant to 'submit to cross-examination, the greatest legal engine ever invented for the discovery of truth'." *Id.* (citations omitted).

In *Idaho v. Wright*, this Court held that the Confrontation Clause forbids the use of out-of-court statements in criminal trials when the declarant is unavailable unless: (1) the evidence falls within a "firmly rooted hearsay exception" to the hearsay rule; or (2) "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." 497 U.S. 805, 820, 110 S.Ct. 3139, 3149, 111 L.Ed.2d 638 (1990). Out-of-court statements not falling within a "firmly rooted exception" to the hearsay rule are "presumptively unreliable" and can only be admitted in an "exceptional case," where the "circumstances surrounding [the declarant's] statement b[ear] 'particularized guarantees of trustworthiness'." *Lilly*, 526 U.S. at

135-136, 119 S.Ct. at 1899-1900 (citations omitted). "Particularized guarantees of trustworthiness" must be drawn from the circumstances surrounding the statement itself, not from corroboration by other evidence offered at trial. In other words, the state may not "bootstrap on the trustworthiness of other evidence" in making the required showing of trustworthiness. *Id.* at 138, 119 S.Ct. at 1900-1901.

In this case, as explained below, the out-of-court statement introduced by the Commonwealth did not fall within the traditional "state of mind" exception to the hearsay rule as understood at common law and as articulated under this Court's long-standing precedent. Further, the Commonwealth did not present any particularized guarantees of trustworthiness surrounding the statement. Therefore, in holding that the "state of mind" exception allowed the decedent's statement into evidence, the Supreme Court of Pennsylvania committed constitutional error with far-reaching consequences for criminal trials in the Commonwealth and elsewhere.

### B. The Trial Court's Overextended Application of the "State of Mind" Exception Does Not Qualify as a "Firmly Rooted Exception" to the Hearsay Rule

This Court has never held expressly that the "state of mind" exception to the hearsay rule is a "firmly rooted exception" under the Confrontation Clause. *See Lilly*, 527 U.S. at 126-127, 119 S.Ct. at 1895 (acknowledging that the hearsay exception for "spontaneous utterance" was "firmly rooted," but holding that a "declaration against

penal interest" is not). Assuming, however, that the "state of mind" exception is "firmly rooted," this Court's long-standing precedent establishes that the Pennsylvania courts overextended its application to include the declarant's recollection of past events.

In *Shepard v. United States*, this Court held that where an out-of-court statement is not used "to prove . . . present thoughts and feelings" or future intentions, it cannot be admitted under the "state of mind" exception. 290 U.S. 96, 104, 54 S.Ct. 22, 25, 78 L.Ed. 196 (1933) (reversing husband's murder conviction because trial court improperly admitted evidence of wife's out-of-court statement that he had poisoned her). To support the holding, this Court reasoned that traditional treatises, old English and American cases and journal articles all acknowledge that "[d]eclarations of intention, casting light upon the future, have been sharply distinguished from memory, pointing backwards at the past" under the state-of-mind exception. *Id.* at 106, 54 S.Ct. at 26. If this distinction were ignored, the rule against hearsay would be eviscerated.

In this case, the decedent's alleged out-of-court statement "that he had fucked up a package of dope that belonged to [Fletcher]" was not used at trial to show the decedent's emotions, feelings, or future intentions. To the contrary, it was used only to prove an alleged past factual event – namely, that the decedent had mishandled Fletcher's drugs. That alleged fact was relevant to Fletcher's motive, not to the declarant's state of mind. Nothing in the "state of mind" exception, as traditionally understood, allows the statement's admission. Thus, the

exception as applied here is not "firmly rooted." Nevertheless, the prosecution used the statement to obtain the murder conviction and death sentence against Fletcher, inflicting precisely the unfairness that the Confrontation Clause was designed to prevent.

### C. The Commonwealth Never Demonstrated Any "Particularized Guarantees of Trustworthiness"

This Court has held that the admission of an out-of-court statement not fitting within any "firmly rooted" exception to the hearsay rule violates the Confrontation Clause unless the circumstances surrounding the statement demonstrate its veracity so convincingly that cross-examination is superfluous. *Lilly*, 527 U.S. 135-138, 119 S.Ct. at 1899-1901.[8]

In this case, the record is conspicuously devoid of any specific information about the setting, conversational context, motivation for speaking, number of persons present, or other factors that may relate to the trustworthiness of the decedent's alleged out-of-court statement. Indeed, the circumstances surrounding the statement carry no indicia of reliability, making cross-examination essential. Admission of the out-of-court statement was clear constitutional error, violating the Confrontation Clause of the Sixth Amendment.

---

[8] Common sense dictates that where the statement was admitted improperly under a purported exception to the hearsay rule at the trial court, the record will not reflect any "particularized guarantees of trustworthiness."

### D. The Trial Court's Violation of The Confrontation Clause Constitutes Reversible Error

The unconstitutional admission of the decedent's alleged out-of-court statement demands reversal because it was the Commonwealth's only evidence establishing motive in the guilt phase of the trial, and one of only two aggravating factors in the penalty phase. Where evidence is admitted in violation of the Confrontation Clause, the resulting conviction must be reversed unless the prosecution proves the error harmless beyond a reasonable doubt. *Idaho v. Wright*, 497 U.S. 805, 827, 110 S.Ct. 3139, 3153, 111 L.Ed.2d 638 (1990). Indeed, this Court has recognized that improper admission of an incriminating out-of-court statement by the decedent in a murder case is particularly prejudicial because the decedent's "voice from beyond the grave" can be expected to have a powerful impact on the jury. *Shepard*, 290 U.S. 96, 98, 54 S.Ct. 22, 23, 78 L.Ed. 196 (1933) (there was "more than unsubstantial error" where "[t]he voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt.").

This case is rife with prejudice. The Commonwealth's theory of the case was that the decedent was killed because he "messed up" a package of drugs he was supposed to sell for Fletcher. The prosecutor hammered on the alleged motive in his closing argument, stating that the evidence of motive is "why this case is so overwhelming." *App.* at 59a-60a. The decedent's alleged out-of-court statement, however, was the only evidence proffered to show the alleged motive.[9]

---

[9] The Supreme Court of Pennsylvania misapprehended the trial record in finding that admission of the decedent's out-of-

After violating Fletcher's rights under the Confrontation Clause, the trial court aggravated the prejudice by opining to the jury that the testimony regarding an alleged drug deal between Fletcher and the decedent established motive: "I guess the evidence in this case, and you make your own determination, was that there was a motive, a drug-related transaction in which the deal didn't go through and I guess they talked about the delivery of the cocaine, smoking the cocaine by the deceased, so I guess you can label that motive money, revenge." *App.* at 61a The court's opinion on motive contributed to both the conviction and the death sentence. This court should grant the writ to address these serious constitutional violations, which deprived Fletcher of a fair trial.

## III. THE PROSECUTION VIOLATED FLETCHER'S RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY ARGUING THAT FLETCHER SHOULD BE SHOWN NO MERCY BECAUSE HE FAILED TO EXPLAIN THE MOTIVES AND REASONS FOR HIS CONDUCT, EVEN THOUGH THE TRIAL COURT FORBADE HIM FROM DOING SO

Fletcher did not testify during the guilt phase of the trial. At the penalty phase, he testified about his

---

court statement is harmless error because it merely corroborates the testimony of prosecution witnesses "NeNe" Grant and "Poochie" Kirkman. Both Grant and Kirkman testified to the same alleged out-of-court statement by the decedent, so their testimony only compounded the error. *App.* at 7a-8a, 62a. Furthermore, Grant's testimony on the issue was stricken from the record. *App.* at 7a-8a.

childhood, family life and boxing career. Fletcher did not, however, testify about his confrontation with the decedent. Indeed, he was forbidden from doing so by the trial court's order *in limine* precluding him from testifying about the circumstances of the killing. Notwithstanding, the prosecutor's closing argument at the penalty phase was saturated with improper comments about Fletcher's failure to explain the reasons for his confrontation with the decedent and his failure to express remorse. In addition, the prosecutor called upon the jury to act vengefully by not bestowing any mercy. The prosecutor's comments violated Fletcher's clear Fifth Amendment and Due Process rights.

### A. The Prosecutor's Comment on Fletcher's Failure to Explain the Circumstances of the Crime Violates Due Process.

The Due Process Clause of the Fourteenth Amendment prohibits a state from inducing the accused to remain silent about the charges against him, and then using that silence against him in argument to the jury. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (Fourteenth Amendment violated where police gave *Miranda* warnings, suspect remained silent based on "implicit assurance" in the warnings that silence would not be used against him, and prosecution then attacked his testimony at trial because he had not given his version earlier).

In this case, the prosecutor knew that the trial court precluded Fletcher from testifying about the circumstances of the killing or his motive for confronting

Christopher. In his closing argument at the sentencing hearing, the prosecutor invited the jury to penalize Fletcher for failing to explain himself on the very issues the trial court would not allow him to address:

> When he took the stand yesterday and had people testify on his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse of his killing of Vaughn Christopher because of drug involvement, he would have told you; he would have admitted it like a man and he would have, at that time, asked for mercy. But, that has never happened in this case, so, I submit to you, the time for mercy has long since past.

*App.* at 64a.

That argument, in light of the restrictions the trial court placed on Fletcher's testimony, was fundamentally unfair and violated Fletcher's right to Due Process. This Court should grant certiorari to vindicate Fletcher's right to a fair trial.

### B. The Prosecutor's Comment on Fletcher's Failure to Express Remorse Violates Fletcher's Fifth Amendment Right Against Self-Incrimination

The prosecutor's remarks about Fletcher's failure to express remorse also constitute an impermissible comment on his failure to testify, in violation of his Fifth Amendment privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965) (the Fifth Amendment's self-incrimination clause bars a prosecutor from commenting to the

jury on a defendant's failure to testify at trial because such comment "is a remnant of the 'inquisitorial system,'" and "cuts down on the privilege by making its assertion costly.") (quoting *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-1597, 12 L.Ed.2d 678 (1964)). The *Griffin* rule applies equally in both the guilt and penalty phases of a death penalty trial. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (this Court could "discern no basis to distinguish between the guilt and penalty phases of the defendant's murder trial so far as the protection of the Fifth Amendment is concerned.").

Here, the prosecution violated *Griffin* by commenting on Fletcher's failure to testify – specifically his failure to "admit it like a man . . . [or] express true remorse. . . . " In light of the fact that the jury found two mitigating circumstances and two aggravating circumstances, this constitutional error cannot be deemed harmless in the jury's ultimate decision to impose the death sentence, and this Court should grant Fletcher's writ of certiorari to address the constitutional violation.

### C. The Prosecutor's Comments Appealed to Vengeance in Violation of Fletcher's Right to Due Process of Law

The prosecutor's comments in his closing argument that "I don't think this is the time for mercy" and "the time is long since past and the defendant has not really acted out a request for mercy . . . " constitute an appeal to vengeance calculated to inflame the jury and deflect its

attention from proper consideration of its duty in violation of due process of law. Although the prosecutor could properly counsel the jury to avoid emotional responses not rooted in the trial evidence, and could argue in favor of the purposes of the death penalty, the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its determination in an unmerciful manner. *See California v. Brown*, 479 U.S. 538, 542-43, 107 S.Ct. 837, 840, 93 L.Ed.2d 934 (1987); *Gregg v. Georgia*, 428 U.S. 153, 183-87, 96 S.Ct. 2909, 2929-2931, 49 L.Ed.2d 859 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).

In *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 738 (1986), the Eleventh Circuit Court of Appeals considered the propriety of a prosecutor's quotations in his closing argument from century-old Georgia Supreme Court opinions frowning upon mercy. Specifically, the prosecutor read a quotation condemning "that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime . . . " and "the false humanity that starts and shudders when the axe of justice is ready to strike." *Id.* The court held that these remarks were improper, explaining that

> [T]he ultimate power of the jury to impose life [imprisonment], no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale. . . . Thus, the suggestion that *mercy* is *inappropriate* was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

*Id.* at 1460 (emphasis added). Here, as in *Drake*, the prosecutor's comments were calculated to incite a harsh and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence. They were intended impermissibly to negate mercy as an appropriate sentencing rationale. The comments cannot be deemed harmless in light of the fact that the jury in this case found an equal number of mitigating and aggravating circumstances. The error warrants review by this Court.

## CONCLUSION

This Court should grant the petition for certiorari, reverse the decision of the Supreme Court of Pennsylvania, and remand this case for a new trial.

Respectfully submitted,

JEROME J. SHESTACK
*Counsel of Record*

JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097

*Counsel for Petitioner,*
*Anthony Fletcher*

[J-192-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee,<br><br>v.<br><br>ANTHONY FLETCHER,<br><br>Appellant. | : | No. 141 Capital Appeal Docket<br><br>Appeal from the Judgment of Sentence entered on February 5, 1993 in the Court of Common Pleas of Philadelphia No. 6001, 6003 March Term 1992, Capital Numbers 6001 March Term 1992.<br><br>ARGUED: October 10, 1998 |

## OPINION OF THE COURT

**MR. JUSTICE CASTILLE DECIDED: March 24, 2000**

In January of 1993, a jury convicted appellant of first-degree murder[1] and possessing an instrument of crime[2] and imposed a sentence of death.[3] This direct appeal

---

[1] 18 Pa.C.S. § 2502(a).

[2] 18 Pa.C.S. § 907(a).

[3] The jury found two aggravating circumstances: that appellant knowingly created a grave risk of danger to another person in addition to the victim of the offense, 42 Pa.C.S. § 9711(d)(7), and that at the time of the killing, the victim was or had been involved or in competition with appellant in the illegal sale, manufacture, distribution or delivery of any controlled or counterfeit controlled substance, and the killing resulted from or was related to the association or competition to promote appellants illegal activities, 42 Pa.C.S. § 9711(d)(14). The jury

followed. For the reasons expressed herein, we affirm the judgment of sentence imposed by the Court of Common Pleas of Philadelphia County.

In all cases where the death penalty has been imposed, this Court is required to conduct a review of the sufficiency of the evidence. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26, 454 A.2d 937, 942 (1982), *cert. denied*, 461 U.S. 970 (1983), *reh'g denied*, 463 U.S. 1236 (1983). In reviewing the sufficiency of the evidence, this Court must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to support all the elements of the offense beyond a reasonable doubt. *Commonwealth v. Bronshtein*, 547 Pa. 460, 469, 691 A.2d 907, 911 (1997), *cert. denied*, 522 U.S. 936 (1997). Evidence is sufficient to sustain a conviction for first degree murder where the Commonwealth establishes that the defendant acted with a specific intent to kill; that a human being was unlawfully killed; that the person accused did the killing; and that the killing was done with deliberation. 18 Pa.C.S

---

found two mitigating circumstances: that appellant was under the influence of extreme mental or emotional disturbance, 42 Pa.C.S § 9711(e)(2), and other evidence of mitigation concerning the character and record of appellant and the circumstances of his offense, 42 Pa.C.S. § 9711(e)(8). The jury determined that the aggravating circumstances outweighed the mitigating circumstances. *See* 42 Pa.C.S. § 9711(c)(iv)(the verdict must be a sentence of death if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances).

The trial court also sentenced appellant to two and one-half to five years' imprisonment for the weapons offense.

§ 2502(d); *Commonwealth v. Speight*, 544 Pa. 451, 459, 677 A.2d 317, 321 (1996), *cert. denied*, 519 U.S. 1119 (1997). Specific intent to kill can be inferred from the use of a deadly weapon upon a vital part of the body. *Id.*

Here, Natalie Grant testified at trial that, on March 2, 1992, at approximately 12:59 a.m., appellant approached herself, Vaughn Christopher and Ronald Williams outside of a drug house in Philadelphia. Appellant asked Christopher where his money was and, before Christopher could respond, appellant pulled out a handgun and fired three shots, striking Christopher twice in the upper torso. Police found Christopher in an unconscious state, leaning against a fence not far from the scene. Christopher died later that day in the hospital.

Police interviewed Williams and Angelic Kirkman, another eyewitness, each of whom identified appellant as the shooter, as well as eight other people who were in the drug house, but who were unable to provide any information regarding the shooting.[4] During the guilt phase of trial, Williams testified and denied having provided a statement to police implicating appellant in the murder. Therefore, his statement to police was admitted as substantive evidence. In that statement, Williams stated that he was three feet away from appellant when appellant approached Christopher, asked for his money and shot Christopher before Christopher could answer. Kirkman's statement to police was admitted into evidence during

---

[4] Grant was not interviewed until two weeks after appellant was arrested because police were unable to locate her.

the guilt phase, although she did not actually testify until the penalty phase.

Based on the information provided by Williams and Kirkman, appellant was arrested on March 10, 1992. After being informed of his *Miranda*[5] rights, appellant gave a statement to police that he approached the victim at the crime scene and punched the victim in the head because the victim had stolen money from him during a crap game. According to appellant, the victim then pulled out a handgun and a struggle ensued. After appellant seized the gun, he claimed that he fired it twice into the victim's leg.[6]

We find that this evidence demonstrates beyond a reasonable doubt that the killing was committed with malice aforethought sufficient to sustain appellant's conviction for first-degree murder.

Trial court error in the guilt phase

Appellant alleges several points of trial court error during the guilt phase. First, he argues that the trial court erred in failing to suppress the statement appellant gave to police following his arrest on the ground that the statement was obtained in violation of his Sixth Amendment right to counsel. Appellant alleges that he informed the police investigators prior to questioning that he wished to speak to an attorney but the request was

---

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] As noted previously, the evidence established that the shots were fired in the victim's torso, not his leg.

thwarted and that police used psychological pressure to coerce him into giving a statement.

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. *Commonwealth v. Hall*, 549 Pa. 269, 283, 701 A.2d 190, 197 (1997), *cert. denied*, 118 S. Ct. 1534 (1998). When reviewing rulings of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

The Commonwealth bears the burden of establishing a knowing and voluntary waiver of *Miranda* rights. *Commonwealth v. Hughes*, 521 Pa. 423, 443, 555 A.2d 1264, 1274 (1989). In order to do so, the Commonwealth must establish that the proper warnings were given and that the accused manifested an understanding of these warnings.

At the suppression hearing, the detective who conducted the interview of appellant testified that he read appellant his *Miranda* rights prior to conducting the interview, that appellant signed a form acknowledging that he had been informed of his rights and that he understood them, and that appellant voluntarily waived his rights and gave a statement.[7] The detective further testified that

---

[7] Appellant's signed waiver of his rights is included in the record.

at no point did appellant request an attorney and that, had appellant done so, the detective would have terminated the interview. Conversely, appellant testified that he requested an attorney, but that the detective informed him that in order to get an attorney appellant would need fifty-thousand dollars.

The trial court weighed the credibility of both appellant and the detective and found appellant's claim that he was denied the assistance of an attorney to be incredible. In so concluding, the trial court pointed to several inconsistencies in appellant's testimony at the suppression hearing. *See* Trial Ct.'s Findings of Fact and Conclusions of Law, 5/12/97 at 9-10. That finding is supported by the record and will not be disturbed. *Commonwealth v. McCracken*, 540 Pa. 541, 551, 659 A.2d 541, 546 (1995) (appellate courts must defer to credibility determinations of the trial court, who observed the witness's demeanor first hand). Accordingly, the trial court did not err in denying appellant's motion to suppress.

Next, appellant claims that the trial court erred in instructing the jury that Commonwealth witness Natalie Grant might be a reliable witness if she had not used drugs on the day of the murder. Grant had testified that, although she had formerly used drugs, she had not used any drugs on the night of the murder or the day before the murder. Grant further testified that she was not intoxicated at the time of the murder and that she had stopped using drugs completely three months before the trial. During cross-examination, at one point, defense counsel made the statement that "a junky's word is worthless." N.T. 1/22/93 at 33. Following the prosecutor's objection, the court issued the following instruction to the jury:

> . . . You are to disregard the prejudicial impact of that comment. The law of Pennsylvania is this: The consumption of drugs is relevant to determine credibility if it has been established that a person is under the influence of drugs at the time of the incident which he or she is witnessing at the time of the trial. That's a factor to be taken into consideration in evaluating their testimony as to a depiction from the witness box respecting the incident that may have occurred. But, first, you have to determine whether or not they, in fact, had taken drugs or were under the influence of drugs at the time of the incidents that were testified to at trial. Most obviously, if someone is drunk or under the influence of drugs at the time they witnessed something, it impairs their ability to observe, retain and recall what they were observing. So, you have to be careful to avoid any prejudicial impact, in light of what I have just instructed you, which is the law of Pennsylvania, from the comment, "all you junkies are unreliable witnesses in the witness box."

N.T. 1/22/93 at 33-34. The court gave a similar instruction in its final charge to the jury. We find no error in the trial court's instruction to the jury. The trial court properly performed its duty by promptly issuing an accurate curative instruction concerning the witness's drug use following defense counsel's baseless personal assessment of a drug abuser's credibility. Accordingly, this claim warrants no relief.

Next, appellant asserts that the trial court erred in failing to declare a mistrial or give a curative instruction after the jury heard hearsay testimony from Natalie Grant

concerning appellant's involvement with drugs.[8] A motion for mistrial is a matter addressed to the discretion of the court. *Commonwealth v. Jones*, 542 Pa. 464, 488-89, 668 A.2d 491, 502-03 (1995), *cert. denied*, 519 U.S. 826 (1996). A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. *Id.*

In response to questions from the prosecutor regarding a possible motive for the killing, Grant testified that the victim had told her that appellant had given the victim a package containing drugs. N.T. 1/25/93 at 25.[9] The trial court immediately ordered the witness's testimony concerning motive to be stricken from the record on the basis that the statement was hearsay and advised the jury that it was to disregard the testimony. N.T. 1/25/93 at 26. In its final instructions, the trial court again reiterated to the jury that it could not consider any evidence that the court had ordered stricken from the record. We find that the instruction was sufficient to cure any possible prejudice to appellant.[10] Absent evidence to

---

[8] Appellant also claims that the trial court erred in failing to give a curative instruction. Although appellant did not request a curative instruction at trial, he has alleged that trial counsel was ineffective for failing to do so. Therefore, this claim is properly before the Court and is discussed *infra*.

[9] Appellant also claims that the court should have declared a mistrial after Grant testified that she saw the defendant engaged in drug activity, arguing that such testimony was inadmissible hearsay. Because testimony regarding events that she witnessed personally does not constitute hearsay, that claim is meritless.

[10] Even though the trial judge ordered the testimony stricken, it should be noted that, during the penalty phase, the

the contrary, the jury is presumed to have followed the court's instructions. *Commonwealth v. Baker*, 531 Pa. 541, 559, 614 A.2d 663, 672 (1992) (our law presumes that juries follow the court's instructions as to the applicable law). Accordingly, the trial court did not err in failing to declare a mistrial.

Appellant's next claim is that the trial court improperly expressed its opinion in its jury instruction as to appellant's motive, thus prejudicing appellant by effectively removing the determination of motive from the province of the jury. This claim is technically waived due to appellant's failure to object to the instruction when issued.[11] Pa.R.Crim.P. 1119 (no portions of the charge nor omissions therefrom may be assigned as error unless specific objections are made thereto before the jury retires to deliberate); *Commonwealth v. Edmondson*, 718 A.2d 751, 752 (Pa. 1998) (due to appellee's failure to object to an instruction when the court issued it, the issue was not properly preserved for appeal). Nevertheless, we may still reach the merits of the claim pursuant to the relaxed waiver rule in direct appeals involving capital cases as stated in *Zettlemoyer, supra* at 26 n.3, 454 at 942 n.3.

---

jury found as an aggravating circumstance that the victim was or had been involved in competition with appellant in the illegal sale, manufacture, distribution or delivery of any controlled or counterfeit controlled substance, and the killing resulted from or was related to the association or competition to promote appellant's illegal activities, 42 Pa.C.S. § 9711(d)(14). That determination was supported by properly admitted evidence that the murder was drug related. *See* f.n. 26, *infra*.

[11] Appellant does not challenge the effectiveness of his trial counsel for failing to object to this instruction.

The relevant portion of the trial court's instruction concerning motive is as follows:

> Motive, well . . . Motive is not an element or part of that definition of a crime or crimes. Motive is defined as some cause or reason that moves the will and induces action. The term motive is used to refer without distinction to external circumstances or to internal, mental or psychological states which motivates a person's actions or conduct. Thus, money, property, gain, something of value or spite, hatred or ill will can be spoken of as motives for a criminal act.
>
> I guess the evidence in this case, and you make your own determination, was that there was a motive, a drug-related transaction in which the deal didn't go through and I guess they talked about the delivery of the cocaine, smoking of the cocaine by the deceased, so I guess you can label the motive money, revenge. You label them. . . .
>
> . . . It is entirely up to you to determine what weight, if any, should be given the evidence concerning motive in this case.

N.T. 1/29/93 at 57-59.

Appellant fails to demonstrate how he was prejudiced by the court's instruction. The court merely alluded to evidence produced by the Commonwealth at trial while instructing the jury that it could accept all, part, or none of the evidence. Further, in its final instructions the trial court briefly summarized the trial evidence, but emphasized that the jury's recollection of the evidence controlled and that the jury should disregard any statement of the court that did not accurately reflect the jury's

recollection. The court further explained that its summary of the evidence should not be construed to suggest that the court took any position regarding the truth of any testimony. N.T. 1/29/93 at 37-38. Finally, both before and after the instruction on motive, the court summarized appellant's statement to police in which appellant claimed that he approached the victim after being robbed by him at a crap game, that the victim drew the weapon first and that appellant shot the victim by accident. The court explained that, if believed, appellant's statement entitled him to an outright acquittal. N.T. 1/29/93 at 64-74. Accordingly, no relief is warranted on this basis.

Appellant's next claim is that the trial court erred in refusing to grant a mistrial after the prosecutor questioned on direct examination the detective who interviewed eight individuals shortly after the murder about his efforts to obtain an arrest warrant. Specifically, the prosecutor asked, "Now, after having interviewed Skeet on the 5th and having spoken to the eight people from the drug house and after having spoken to Angelic Kirkman or Poochie, did you prepare a warrant of arrest?" N.T. 1/21/93 at 112. Appellant asserts that the trial court erred in denying defense counsel's motion for a mistrial because the question implied that the eight people had made statements incriminating appellant. We disagree.

The purpose of this line of questioning, as explained by the prosecutor at a sidebar discussion, was to refute defense counsel's assertion that the entire investigation of the matter was based on false information from Natalie

Grant,[12] and to demonstrate the chronology of events pertaining to the detective's investigation of the case. Following defense counsel's objection, the trial court issued a cautionary instruction as follows:

> Ladies and gentlemen, I explained probable cause to you in my preliminary instructions. Probable cause is not proof of evidence of guilt. You don't infer guilt because of the fact of an arrest and the legality of the arrest is not a question of concern to you. You already know he's arrested, so do not draw the inference of guilt from that fact of his arrest. This is just a chronological order of events as they transpired.

N.T. 1/21/93 at 116-117. In addition, as part of its final charge, the trial court instructed the jury that the mere fact that the defendant was arrested and accused of a crime was not to be considered as evidence of appellant's guilt. Absent evidence to the contrary, the jury is presumed to have followed the court's instructions. *Baker,*

---

[12] On cross-examination of Commonwealth witness Ronald Williams, defense counsel attempted to show that Williams falsely implicated appellant in the murder. Williams testified on cross that Natalie Grant must have provided police with false information that Williams was an eyewitness to the murder. N.T. 1/20/93 at 74. In addition, on cross-examination of one of the investigators, appellant attempted to establish that police had fabricated Williams's written account of the murder based on information they had received from Natalie Grant. The detective's testimony was relevant to refute appellant's contention of police fabrication since Natalie Grant was not one of the people interviewed prior to appellant's arrest. Rather, police were unable to locate her until two weeks after appellant's arrest.

*supra* at 559, 614 A.2d at 672. Appellant fails to demonstrate that the instruction was inadequate to cure any prejudice that may have stemmed from the prosecutor's question. Next, appellant asserts that the trial court "assumed a prosecutorial role" and improperly questioned and cross-examined Natalie Grant and impugned her testimony and credibility. Initially, we note that Natalie Grant was a Commonwealth witness and, therefore, any question the court posed that damaged the witness's credibility would seem only to assist appellant, not prejudice him. Furthermore, the trial court did not ask any questions of the witnesses at the places in the record indicated by appellant. The "interrogation" of which appellant complains actually consisted of instructions to the witness directing her to answer certain questions from defense counsel and not to answer other questions.[13] Therefore, we find appellant's claim to be meritless.

Next, appellant claims that the trial court erred by instructing the jury that "neither side has the right to prevail upon a witness to appear in court." N.T. 1/26/93 at 107.[14] When evaluating a jury instruction, "[w]e will

---

[13] When defense counsel questioned Grant regarding her criminal history, the witness responded with a vague answer concerning the number of thefts she had committed. Accordingly, the trial court interjected, explaining to the witness the importance of providing an answer and explaining to both the witness and the jury that certain crimes were considered *crimen falsi* in nature and could be properly used to evaluate the witness's credibility.

[14] This claim is technically waived due to appellant's failure to object at trial. Nevertheless, we will address the issue

not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Prosdocimo*, 525 Pa. 147, 154, 578 A.2d 1273, 1276 (1990). The law is clear that, under Pa.R.Crim.P. 9016, either side can subpoena a witness to appear in court. To the extent that the court's instruction was unclear or inaccurate, the trial court's instruction nevertheless constituted harmless error under the circumstances of the case.

In a related claim, appellant asserts as error that, during the cross-examination of a defense witness, the prosecutor asked the witness why he had refused to speak to the prosecutor prior to testifying for the defense. N.T. 1/26/93 at 106. Following this line of questioning, pursuant to defense counsel's request, the trial court instructed the jury regarding the law on a witness's right to refuse to be interviewed by the opposing attorney in a criminal matter. The court's instruction on the whole centered on a witness's right to refuse to give a statement to the opposing attorney in a criminal matter. The trial court's limited instruction regarding a party's ability to compel a witness to appear in court was not at issue. When the instruction is reviewed as a whole, it clearly instructed the jury that the defense witness was not obligated to speak to the prosecutor prior to trial so as to remove any negative inferences that may have arisen from the witness's pretrial decision not to speak with the

---

pursuant to the relaxed waiver rule. *Zattlemoyer, supra*, at 26 n.3, 454 A.2d at 942 n.3.

prosecutor. Further, at the conclusion of the court's instruction, defense counsel expressed satisfaction with the content of the instruction. N.T. 1/26/93 at 107. Appellant fails to demonstrate how he was prejudiced by the court's instruction. Accordingly, no relief is due.

Next, appellant alleges that the trial court erred by failing to grant a mistrial *sua sponte* after certain remarks by the prosecutor during closing argument in the guilt phase. As a general rule, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict. *Bronshtein, supra* at 482, 691 A.2d at 917.

First, appellant complains that the prosecutor made remarks that stigmatized defense counsel. Specifically, the prosecutor stated, "I listened to [defense counsel]. It seemed like a totally different man today. It must have been Skippy, the evil twin brother that has been here for the past 10 days. All of a sudden today when he makes his closing argument to you he is like a new man, quiet, subdued, relaxed, calm." N.T. 1/27/93 at 91. The prosecutor went on to state that defense counsel's job was to confuse the jury.

While such personal comments are to be avoided, defense counsel himself first raised the issue of his behavior during trial during the closing argument. Defense counsel apologized for his offensive behavior during trial, admitting that he acted "jerky" and "a little crazy." N.T. 1/27/93 at 21, 38. However, defense counsel

also launched personal attacks on the prosecutor and the police witnesses.[15] Further, the trial court noted in its opinion that "defense counsel, indeed, changed his trial demeanor drastically upon delivering his closing argument." Trial Ct. Slip Op. at 55. In light of defense counsel's behavior and his own closing comments regarding his behavior, we find the trial court correctly refrained from declaring a mistrial *sua sponte* with respect to the prosecutor's remarks concerning defense counsel.

Appellant further complains that he was unduly prejudiced by the prosecutor's statement that the evidence that appellant was a drug dealer was overwhelming. However, our review of the record reveals that what the prosecutor actually said was that the *case* against appellant was overwhelming. N.T. 1/27/93 at 135-36. We find that this was a fair comment on the evidence and, thus, no relief is due on this claim.

Finally, appellant complains that the court erred in failing to declare a mistrial after admonishing the prosecutor for making a sympathy argument to the jury concerning the victim. The prosecutor argued that the victim and Natalie Grant were not "throw away people" because they used drugs and asked the jury what they as members of society were going to do about the murder. N.T.

---

[15] Specifically, defense counsel stated that that [sic] the prosecutor could not seek a first degree murder conviction with a straight face, was extremely aggressive, engaged in overreaching, and that the Commonwealth had lost its moral compass. N.T. 1/27/93 at 24-26, 39-40, 85. Defense counsel asserted that the police had "tunnel vision" and a "myopic viewpoint" and that they had attempted to prejudice the jury. *Id.* at 24, 76.

1/27/93 at 164-65. The trial court sustained defense counsel's objection and instructed the prosecutor to "give up the sympathy provoking argument and go on." *Id.* Appellant fails to demonstrate how the prosecutor's brief statements created a fixed bias or hostility in the minds of the jurors. The court promptly instructed the prosecutor to abandon that line of argument and the prosecutor complied. Additionally, the trial court instructed the jury that counsel's arguments were not evidence. N.T. 1/29/93 at 26-29. Absent evidence to the contrary, the jury is presumed to have followed the court's instructions. *Baker, supra* at 559, 614 A.2d at 672. Accordingly, no relief is warranted.

Ineffectiveness of trial counsel in the guilt phase

Appellant raises several claims of ineffectiveness of counsel during the guilt phase.[16] In order to establish an ineffectiveness claim, appellant must demonstrate: (1) that the underlying claim is of arguable merit; (2) that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate appellant's interest; and (3) that there is a reasonable probability that the act or omission prejudiced appellant in such a way that the outcome of the proceeding would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, ___, 724 A.2d 326, 331 (1999). If it is clear that appellant has not met the prejudice prong of the ineffectiveness standard, the claim may be dismissed on that basis alone and this Court need

---

[16] We note that appellant is represented by new counsel for purposes of appeal.

not determine whether the first and second prongs have been met. *Commonwealth v. Travaglia*, 541 Pa. 108, 118, 661 A.2d 352, 357 (1995), *cert. denied*, 516 U.S. 1121 (1996).

Appellant first claims that trial counsel was ineffective for failing to object to the trial court's "emphasis" of the criminal record of defense witness, Michael Golden.[17] This claim is meritless. Here, the prosecutor was cross-examining the witness concerning his decision to testify for the defense. Without any prompting from the prosecutor, the witness interrupted the questioning with the following outburst: "If your honor would allow me to speak here about something. You say you pulled my record –." N.T. 1/26/93 at 119. The court interrupted the witness and informed him that his record was not at issue and that no one had asked him any questions regarding his criminal record. The court instructed the witness to merely answer the questions that were asked of him. Thus, contrary to appellant's assertion, the trial court acted to *prevent* the witness from revealing his criminal record. The court was merely reacting to an unsolicited outburst on the part of the witness concerning the witness's criminal record, which the prosecution had not asked about. Accordingly, trial counsel was not ineffective for failing to object to the trial court's efforts to prevent prejudice to appellant from the outburst of a defense witness.

---

[17] Appellant also raises the claim that the trial court erred in repeatedly emphasizing the witness's criminal record. Technically, this claim is waived due to counsel's failure to lodge a timely objection at trial. However, we reach the merits of the claim because appellant has also raised counsel's ineffectiveness for failing to object.

Appellant's next claim is that trial counsel was ineffective for failing to request a pre-trial psychiatric examination of appellant, given that appellant had previously suffered head injuries during a professional boxing career. This claim is meritless. Appellant fails to offer any evidence of his alleged mental defects. In addition, the trial court stated in its opinion that it never observed the slightest trace of psychological impairment that would have raised questions as to whether a pre-trial psychiatric evaluation was necessary. Trial Ct. Slip Op. at 65. Appellant testified coherently and articulately at a pre-trial suppression hearing, at the penalty hearing, and at the post-verdict hearing. Accordingly, this claim must fail.

Next, appellant asserts that trial counsel was ineffective for failing to request that the trial court issue a curative instruction after the court struck the testimony of Natalie Grant concerning appellant's motive – the drug transaction with the victim. *See* discussion *supra*. This claim is meritless. As previously discussed, the trial court immediately ordered the witness's hearsay testimony concerning motive to be stricken from the record. N.T. 1/25/93 at 26. The trial court further immediately advised the jury that it was to disregard the testimony. Additionally, in its final instructions, the trial court reiterated to the jury that it could not consider any evidence that the court had ordered stricken from the record. Thus, it was not necessary for counsel to request a curative instruction when the court sufficiently instructed the jury regarding the stricken testimony.

Next, appellant claims that trial counsel was ineffective for allegedly telling appellant that he could not testify during the guilt phase. This claim flies in the face of

the record. The trial court conducted a colloquy with appellant on the record concerning appellant's right to testify. Appellant stated under oath that he discussed his right to testify with his trial counsel and that he had made his *own* decision to assert his Fifth Amendment right not to testify. N.T. 1/26/93 at 138-142. The trial court advised appellant that he was under no obligation to take counsel's advice regarding his decision whether or not to testify and appellant indicated that he understood. The trial court specifically asked appellant if he chose to remain silent solely because counsel advised him to do so, and appellant indicated that his refusal to testify was of his own free will. *Id.* Accordingly, no relief is warranted.

Appellant next asserts that counsel was ineffective for failing to present certain defense witnesses at trial. To prevail on a claim of trial counsel's ineffectiveness for failure to call a witness, the defendant must show: (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant. *Commonwealth v. Pursell*, 555 Pa. 233, 724 A.2d 293, *cert. denied*, 120 S.Ct. 422 (1999).

Appellant argues that defense counsel should have called appellant's aunt, uncle and wife to testify during the guilt phase of trial about his alleged impoverished living conditions, that he had borrowed money from them and that he earned his living as a tailor, for the purpose of contradicting the prosecution's theory of the

case that appellant made his money from being a drug dealer. During the penalty phase of trial, defense counsel had called these witnesses to testify as to appellant's familial relationships. Evidence regarding his alleged poverty and sources of income was only elicited by the prosecutor on cross-examination, not by defense counsel. Defense counsel could reasonably have determined that the testimony offered by the witnesses would have been unhelpful to appellant since his alleged poverty may reasonably have been seen by the jury as an incentive for him to get involved in drug dealing.

Moreover, the testimony of appellant's aunt and wife may have been detrimental. Appellant's aunt testified on cross-examination that appellant worked as a tailor during the years in which appellant had indicated on a questionnaire that he was unemployed, casting doubt on appellant's credibility.[18] N.T. 2/2/93 at 92. During appellant's wife's testimony, she revealed that on the night of the murder they had had an argument and that appellant had left the house upset. N.T. 2/2/93 at 95-96. Therefore, there was a reasonable basis for counsel's decision not to call any of these witnesses in the guilt phase and appellant is not entitled to relief on this claim.

Appellant next claims that trial counsel was ineffective for failing to object to statements contained in a witness's statement to police pertaining to what the murder victim had related to him about appellant some time before the victim's death. The statements in question

---

[18] The record does not indicate what type of questionnaire contained this information.

were read as part of Ronald Williams's prior statement to the police, which was introduced both as substantive evidence and to impeach Williams.[19] In Williams's written statement, in response to the detective's question concerning the motive for the shooting, Williams replied, "Dope. [The victim] told me that he had f–ed up a package of dope that belonged to [appellant]. He smoke [sic] up all the crack in the package and [appellant] never said anything. [Appellant] just walked up on [the victim] and shot [the victim]." N.T. 1/20/93 at 44.

The victim's statement to Williams was relevant in establishing the victim's state of mind regarding his relationship with appellant and was therefore admissible under the state-of-mind hearsay exception to establish "the presence of ill will, malice or motive for the killing." *Commonwealth v. Chandler*, 554 Pa. 401, 411, 721 A.2d 1040, 1045 (1998) (murder victim's statement to her mother regarding breakdown in relationship admissible under state-of-mind hearsay exception). *See also, Commonwealth v. Puskar*, 559 Pa. 358, ___, n.6, 740 A.2d 219, 225 n.6 (1999) (witness's testimony that victim had said he did not trust appellant and that the victim and appellant were involved in a dispute over the purchase of model trains admissible under state-of-mind exception to hearsay);

---

[19] The prosecutor read Williams's written statement which Williams had signed, after Williams took the stand and denied having seen the shooting or having told the police anything about the shooting. Appellant does not challenge the admissibility of the statement generally. *See Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992) (prior inconsistent statement of non-party witness that has been reduced to writing and signed by declarant is admissible as substantive evidence).

*Commonwealth v. Collins*, 550 Pa. 46, 58-60, 703 A.2d 418, 424-25, *cert. denied*, 119 S.Ct 538 (1998) (victim's statement that appellant had shot her in the past and would shoot her in the head if she messed up a drug package in her possession admissible under state-of-mind exception to prove motive). Because the statement was admissible, this claim lacks merit and counsel was not ineffective for failing to object.

Furthermore, even if the statement arguably was not admissible, the statement was merely corroborative of the testimony of Grant and Kirkman that appellant sold drugs and that the victim had received drugs from appellant and had spent the money. Because the evidence merely corroborated other evidence and the evidence of appellant's guilt – including the testimony of three eyewitnesses – is overwhelming, appellant has failed to establish that the evidence so prejudiced him that the outcome of the trial would have been different had counsel objected. Therefore, even had the statements been improperly admitted, no relief is warranted and this claim is meritless. *Travaglia, supra.*[20]

---

[20] Furthermore, trial counsel's inaction was reasonable in light of Williams's blanket disavowal of his police statement, which contained the challenged hearsay. Moreover, when the prosecution asked Williams if he had made the specific statement at issue, he specifically denied having made such a statement to police or having had such a conversation with the victim. N.T. 1/20/93 at 44-45. Therefore, it was an objectively reasonable strategy for trial counsel to allow Williams to testify without interruption that the information contained in the written statement was not true, and to emphasize that fact on cross-examination rather than focusing on particular aspects of the disavowed statement.

Appellant further asserts that trial counsel was ineffective for calling a detective as a defense witness and eliciting testimony from him regarding the Commonwealth's witness, Natalie Grant. Defense counsel called Detective William Schol, who had previously testified for the prosecution, as a defense witness in an attempt to establish that Natalie Grant's testimony was biased and, therefore, unreliable because the homicide investigators had performed personal favors for her. Specifically, trial counsel elicited from the detective, *inter alia*, that he had driven Grant from the courtroom to the hospital on one occasion to visit her sick infant, which allegedly created sympathy for the prosecution witness, thereby bolstering her credibility and prejudicing appellant.[21]

In his closing argument in the guilt phase, defense counsel argued that Grant's testimony could not be trusted because she owed a debt to investigators for driving her to the hospital and that her testimony was therefore the product of bias. Trial counsel further suggested that Grant had abused cocaine while pregnant, suggesting that the child was ill as a result. N.T. 1/27/93, at 28. Because counsel used this information in an attempt to discredit Grant in front of the jury, he had a reasonable basis for questioning the detective as he did. Therefore, this claim is meritless.

---

[21] Detective Schol also testified that he had picked up Grant and her baby at the hospital the night before she was scheduled to testify and taken them to get a prescription for the child and that he assisted her with her child on more than one occasion.

Trial court error in the penalty phase

We now address appellant's claims of trial court error during the penalty phase. First, appellant claims that the trial court erred in preventing appellant from presenting exculpatory evidence during the penalty phase that would have demonstrated that the shooting was not drug related. This claim is devoid of merit. Appellant took the stand during the penalty phase and testified concerning his background, family, education and employment history. Appellant's family members also took the stand and testified in his favor. The only evidence that the trial court prohibited appellant from presenting during the penalty phase was statements that he was not guilty of the murder for which he had just been convicted. This limitation was proper. *Franklin v. Lynaugh*, 487 U.S. 164, 173-74 (1988) (there is no constitutional requirement that a convicted murderer be permitted to argue residual doubt concerning guilt as a mitigating factor); *Commonwealth v. Harris*, 550 Pa. 92, 109-10, 703 A.2d 441, 449-50 (1997), *cert. denied*, 119 S. Ct. 538 (1998) (counsel was not ineffective for failing to present the residual doubt evidence that two prior juries were hung on the question of appellant's guilt; such evidence has no relevance to the imposition of the penalty). Because the trial court allowed appellant to present all relevant mitigating circumstances, no relief is warranted.

Appellant next claims that the trial court erred in not striking the testimony of Angelic Kirkman during the penalty phase on the basis that the witness was incompetent. Kirkman testified that she was smoking crack cocaine in a parked car with another woman when she

observed appellant shoot the victim and that she overheard appellant make certain remarks while shooting the victim. The trial court asked the witness whether the drugs she had used that night affected her ability to perceive and relay what she saw. The witness indicated that the drugs did affect her perceptions but then stated that she had not heard any remarks the appellant made while shooting the victim. Appellant moved to strike her testimony in its entirety.

The trial court overruled the objection and properly determined that it was for the jury to evaluate Kirkman's credibility against the backdrop of admitted drug use on the night of the killing and her testimonial inconsistencies. These factors went to the weight of her testimony, not her competency. *Commonwealth v. Parks*, 453 Pa. 296, 301, 309 A.2d 725, 728 (1973), *cert. denied*, 414 U.S. 1074 (1973) (a witness is not incompetent *per se* merely because it is established that he is a drug addict and had taken drugs prior to the incident to which he testifies); *Commonwealth v. Farrell*, 319 Pa. 441, 444, 181 A. 217, 218 (1935) ("the use of narcotics may impair mind and memory, the extent of the impairment is for the jury's measurement."). Accordingly, the trial court did not abuse its discretion in failing to strike this testimony.

Next, appellant asserts that the trial court erred by permitting a prosecution witness to read the contents of an arrest warrant affidavit for a robbery charge against appellant that predated the murder. This claim is meritless because defense counsel opened the door for such testimony. Initially, we note that, prior to the commencement of the penalty hearing, and again while the penalty hearing was in progress, both defense counsel and the

trial court advised appellant that if he testified, evidence of his 1989 robbery conviction would be admitted as a *crimen falsi* crime. Appellant nevertheless chose to testify and the prosecution called as a witness the investigator assigned to the robbery case in order to admit evidence that appellant had pleaded guilty to the robbery charge. The prosecutor questioned the investigator only about the guilty plea. No details about the underlying crime were elicited.

On cross-examination, defense counsel elicited from the investigator that, on the day that appellant pleaded guilty to the robbery, the complaining witness informed the investigator that the circumstances leading to the robbery complaint were a mistake and that he was not interested in pursuing the case further, thereby implying that appellant had pleaded guilty to a crime he did not commit. On rebuttal, the prosecutor had the investigator read the contents of the arrest warrant affidavit from the robbery charge. The affidavit included the facts supporting the robbery charge and the fact that appellant told the complainant that he would kill him if appellant was arrested for the incident.

The admission of rebuttal testimony is within the sound discretion of the trial court. *Commonwealth v. Jones*, 530 Pa. 591, 617, 610 A.2d 931, 942 (1992). The challenged testimony rebutted the implication created by the defense that appellant had not committed the robbery in question. Because defense counsel opened the door during cross-examination, it was not an abuse of discretion for the trial court to allow this rebuttal testimony. Additionally, immediately following the investigator's testimony, the trial court instructed the jury that evidence of the robbery

conviction was relevant only to evaluate the credibility of appellant's penalty hearing testimony and that the underlying facts of the conviction were irrelevant to that assessment. We find that the limiting instruction was sufficient and, barring evidence to the contrary, will presume that the jury followed this instruction. *Baker, supra* at 559, 614 A.2d at 672. Accordingly, no relief is due on this claim.[22]

Appellant next claims that the trial court erred by failing to permit defense counsel to examine the contents of the affidavit of probable cause for the robbery charges prior to the investigator reading it into evidence. Appellant asserts that, had the court granted defense counsel's request to view the document, he would have seen the inflammatory and prejudicial statements and requested redaction. Initially, we note that the court properly denied defense counsel's request to view the document while the prosecutor was showing it to the witness. The document was used only for rebuttal during the penalty hearing for the purpose of refuting a defense claim that the police had engaged in improper conduct – arresting appellant for a crime he did not commit. The trial court also properly determined that the affidavit was not subject to pre-trial discovery, as it did not contain exculpatory information and had no relation to the murder for which appellant was on trial. A further review of the

---

[22] Appellant further claims that the trial court erred for failing to grant a mistrial after the affidavit supporting the warrant for the robbery charge was read into evidence. Because, we have concluded that the trial court properly admitted the evidence, we find that the trial court also properly denied the motion for a mistrial.

record reveals that the trial court ordered the prosecutor to turn over the affidavit to defense counsel at the conclusion of the prosecutor's re-direct examination of the witness. Defense counsel did not request a recess in order to examine the document and instead cross-examined the witness about matters relating to the affidavit. Accordingly, no relief is due on this claim.[23]

Next, appellant alleges that the trial court erred by admitting evidence of appellant's previous drug activity. The court had initially granted appellant's motion *in limine* precluding the Commonwealth from presenting evidence of appellant's 1992 conviction for drug-trafficking during its case-in-chief in the penalty phase. However, the court conditioned its ruling on whether appellant presented mitigating evidence that would make the prior drug conviction appropriate rebuttal evidence. Appellant took the stand on his own behalf during the penalty phase and asserted the "catch-all" mitigating circumstance regarding any other evidence of mitigation concerning his character and record and the circumstances of the offense. *See*, 42 Pa.C.S. § 9711(e)(8).

In an effort to show that appellant did not earn money by dealing drugs as the prosecution alleged, appellant testified on direct examination that he made his living as a professional boxer. The trial court correctly determined that this testimony opened the door for the prosecutor to inquire on cross-examination about other

---

[23] Moreover, there is no allegation that appellant had not been provided with a copy of the affidavit at the time that he pleaded guilty; therefore, such evidence was arguably already in his control or at least within his knowledge.

ways in which appellant made money. *Commonwealth v. LaCava*, 542 Pa. 160, 188, 666 A.2d 221, 234 (1995) (prosecutor correctly questioned defendant concerning what he told a witness because, having "opened the door" to the subject on direct, defendant could not complain because the Commonwealth chose to further examine what was behind that door). Appellant testified on cross-examination that he earned money as a boxer, tailor and pool hustler. He further tested on cross-examination that Jamaican drug-dealers once solicited him to work for them as a security guard but he declined the offer. Appellant denied that he became involved in selling drugs. N.T. 2/2/93 at 138. In rebuttal, the prosecutor impeached appellant's testimony by presenting evidence of appellant's arrest for selling drugs in October of 1991, an arrest that resulted in a conviction in April of 1992. Because this evidence was properly admitted to rebut appellant's testimony that he never sold drugs, this claim is meritless.

Appellant next claims that the trial court erred in providing the jury with seven examples of aggravating circumstances while failing to provide any examples of mitigating circumstances.[24] The law of this Commonwealth does not require a trial court to provide any examples of aggravating or mitigating circumstances. Here, in order to aid the jury in understanding the aggravating circumstance asserted by the prosecution – that appellant knowingly created a grave risk of danger to

---

[24] This claim is technically waived due to appellant's failure to object at trial. Nevertheless, we will address the issue pursuant to the relaxed waiver rule. *Zettlemoyer, supra*, at 26 n.3, 454 A.2d at 942 n.3.

another person in addition to the victim of the offense – the trial court presented brief fact patterns derived from case law as illustration. The court merely provided clarification on a point of law that was not within the common experience of jurors. In addition, after deliberating for a full day on the penalty, the jury requested the trial court to reissue the instructions in their entirety and the court complied but omitted the examples in the second set of instructions. Finally, appellant's claim that the court "imbalanced" the charge resulting in prejudice to him is insupportable in light of the fact that that jury found *both* mitigating circumstances asserted by appellant.

Next, appellant asserts that, during closing argument in the penalty phase, the prosecutor committed misconduct by referring to striken [sic] testimony of Natalie Grant.[25] N.T. 2/3/99 at 10-11. The prosecutor mentioned in closing that Natalie Grant was one of the persons whose testimony supported the conclusion that appellant killed the victim because a drug relationship had gone sour. Trial counsel objected to the closing assertion. The trial court sustained the objection and ordered the jury to disregard the prosecutor's comments. Absent evidence to the contrary, the jury is presumed to have followed the court's instructions. *Baker, supra,* at 559, 614 A.2d at 672. Additionally, this statement by the prosecutor is harmless

---

[25] This claim is technically waived due to appellant's failure to object at trial. Nevertheless, we will address the issue pursuant to the relaxed waiver rule. *Zettlemoyer, supra,* at 26 n.3, 454 A.2d at 942 n.3

error in light of the other admissible evidence that the murder was drug related.[26]

Ineffectiveness of trial counsel in the penalty phase

We next address appellant's claims of ineffective assistance of counsel during the penalty phase. First, appellant claims that trial counsel was ineffective for failing to question Angelic Kirkman regarding her competency to testify because it appeared that she was under the influence of drugs and falling asleep while on the witness stand. However, a review of the record reveals that counsel did question Kirkman regarding whether she was using drugs or was falling asleep on the stand. N.T. 2/1/99 at 33-34, 65-67, 76-77. Therefore, this claim is meritless.

Appellant also claims that defense counsel prejudiced him by stating in his closing argument that the case was about drugs. Appellant raised this claim in the form of a question presented for review, but fails to develop this claim by pointing to the specific portion of defense counsel's closing argument to which he objects. Rather, in appellant's brief, he challenges only the *prosecutor's* closing argument, not defense counsel's closing argument,

---

[26] Angelic Kirkman testified that the victim had told her that he was supposed to sell drugs for appellant and had not given appellant the money for the drugs. N.T. 2/1/93 at 26-30. Additionally, in testimony that was not objected to and thus admitted, Natalie Grant testified that appellant asked her to identify houses from which he could buy drugs and gave her his pager number to call with that information. N.T. 1/25/93 at 7-10.

where the prosecutor mentioned appellant's connection with drugs and asserts that defense counsel was ineffective for failing to object to the prosecutor's argument.[27]

We have reviewed the portion of the prosecutor's closing referenced by appellant and find that the prosecutor's statements were fair comment on the evidence presented at trial that appellant was involved in dealing drugs and that the murder was drug related. The statements were not inflammatory or prejudicial under the circumstances. Several witnesses had testified regarding appellant's involvement with drugs.[28] Thus, defense counsel was not ineffective for failing to object.

Finally, pursuant to 42 Pa.C.S. § 9711(h)(3), this Court has a duty to affirm the sentence of death unless we determine that:

---

[27] Specifically, the prosecutor stated:

> When he took the stand yesterday and had people testify on his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse of his killing of Vaughn Christopher because of drug involvement, he would have told you; he would have admitted it like a man and he would have, at that time, asked you for mercy.

N.T. 2/3/93 at 7.

[28] During the penalty phase, the Commonwealth presented the testimony of Angelic Kirkman that appellant had killed the victim over a drug transaction, N.T. 2/1/93 at 26-30, and established appellant's previous conviction for possession with intent to distribute cocaine. N.T. 2/2/93 160-62. Finally, in testimony that was not objected to and thus admitted, Natalie Grant had also testified that appellant asked her to identify houses from which he could buy drugs and gave her his pager number to call with that information. N.T. 1/22/93 at 7-10.

> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the findings of at least one aggravating circumstance specified in subsection (d); or
>
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.[29]

After reviewing the record below, we conclude that the sentence imposed was not the product of passion, prejudice or any other arbitrary factor, but rather was based upon the testimony of the eyewitnesses. In addition, we find that the evidence was sufficient to establish the aggravating factors found by the jury: that appellant knowingly created a grave risk of danger to another person in addition to the victim of the offense, 42 Pa.C.S. § 9711(d)(7), and that at the time of the killing, the victim was or had been involved or in competition with appellant in the illegal sale, manufacture, distribution or delivery of any controlled or counterfeit controlled substance, and the killing resulted from or was related to the association or competition to promote appellant's illegal

---

[29] Effective June 25, 1997, the General Assembly repealed 42 Pa.C.S. § 9711(3)(h)(iii), pursuant to which this review was required. However, we continue to review for proportionality all cases on direct appeal in which the sentence of death was imposed prior to that date. *See Commonwealth v. Gribble*, 550 Pa. 62, 703 A.2d 426 (1997), *cert. denied*, 119 S. Ct. 519 (1998) (Act 28 does not apply retroactively).

activities, 42 Pa.C.S. § 9711(d)(14). Moreover, in accordance with *Zettlemoyer, supra* at 26, 454 A.2d at 942, we must conduct a proportionality review as to appellant's sentence of death. Here, since the jury found that the two aggravating circumstance [sic] outweighed the two mitigating circumstances, the jury was statutorily required to impose a sentence of death. 42 Pa.C.S. § 9711(c)(1)(iv). Further, we have conducted an independent review of similar cases and reviewed the data compiled by the Administrative Office of Pennsylvania Courts in which the sentence of death was made mandatory by the finding of aggravating factors that outweighed mitigating circumstances and conclude that the sentence of death imposed upon appellant is not disproportionate to the sentences imposed in similar cases. Accordingly, we affirm the verdict and the sentence of death imposed upon appellant by the Court of Common Pleas of Philadelphia County.[30]

Mr. Justice Saylor files a concurring opinion in which Mr. Chief Justice Flaherty and Mr. Justice Zappala join.

Judgment entered
Dated: March 24, 2000

/s/ John W. Person
John W. Person, Esquire
Deputy Prothonotary

---

[30] The Prothonotary of this Court is directed to transmit to the Governor's office the full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court pursuant to 42 Pa.C.S. § 9711(i).

[J-192-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | No.141 Capital Appeal Dkt. |
| Appellee | : | Appeal from the Judgment of Sentence entered on February 5, 1993 in the Court of Common Pleas of Philadelphia County, Nos. 6001, 6003 March term 1992 |
| v. | : | |
| ANTHONY FLETCHER, | : | |
| Appellant | : | |
| | : | ARGUED: |
| | : | October 19, 1998 |

## CONCURRING OPINION

**MR. JUSTICE SAYLOR** **DECIDED: March 24, 2000**

I join the majority opinion, save for the conclusion that the victim's out-of-court statement "that he had f___ed up a package of dope that belonged to [Appellant]" was admissible under the state of mind exception to the hearsay rule. I would not permit the state of mind exception to be employed, as it is here, to support the general admission of a statement of memory or belief about a past event, as traditional hearsay dangers of fabrication, faulty memory and incorrect narration are implicated by such use. Moreover, since this manner of application could be extended to a broad range of statements, it effectively undermines the hearsay rule. In my view, application of the state of mind exception should be reserved for statements of intention offered to establish that a declarant acted in conformity therewith, *See, e.g.*,

*Commonwealth v. Collins*, 550 Pa. 46, 59-60, 703 A.2d 418, 424-25 (1997), *cert. denied*, U.S., 119 S. Ct. 538 (1998); and statements which directly indicate the declarant's mental state at the time that the statement was made, where the declarant's state of mind is at issue in the case. *See, e.g., Commonwealth v. Auker*, 545 Pa. 521, 547, 681 A.2d 1305, 1319 (1996).[1] *See generally* Pa.R.E. 803(3).[2]

Because I believe that the hearsay evidence concerning the victim's statement should not have been admitted under our evidentiary rules, I would find that counsel was ineffective for failing to lodge an appropriate objection. I do agree with the majority, however, for the reasons stated in its opinion, that such ineffectiveness did not prejudice the outcome of the trial.

Mr. Chief Justice Flaherty and Mr. Justice Zappala join this concurring opinion.

---

[1] With regard to these forms of statements, reliability may be inferred because of spontaneity and reflection of a then-existing condition of mind or emotion, *see* 2 McCormick, EVIDENCE, §274, at 217 (5th ed. 1999); nevertheless, the out-of-court statement "ought to be accompanied by other, not inconsistent, evidence." *Commonwealth v. Marshall*, 287 Pa. 512, 523, 135 A. 301, 305 (1926), *cited in* Comment to Pa.R.E. 803(3). Additionally, where hearsay is admitted pursuant to the state of mind exception, it should be accompanied by a limiting instruction. *See generally United States v. Brown*, 490 F.2d 758, 763 (D.C. Cir. 1973).

[2] In the specialized context of decedents estates, Pa.R.E. 803(3) would permit admission of a statement of memory or belief offered to prove the fact remembered or believed if it relates to the execution, revocation, identification, or terms of the declarant's will.

**JOHN P. COTTER, ESQ.**
Identification No.: 20166
2541 S. Broad St.
Philadelphia, PA 19148
(215) 336-0343
Fax: (215) 336-1627

Attorney for Appellant

---

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | CAPITAL APPEAL DOCKET |
| vs. | : | No. 141 |
| ANTHONY FLETCHER | : | |

---

PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been served upon: NORMAN GROSS, ESQUIRE, Assistant District Attorney, at his office at 1421 Arch Street, Philadelphia, Pennsylvania, 19102 (215) 686-5730, Counsel for Appellee, Commonwealth of Pennsylvania, by first class mail, postage prepaid, which manner of service satisfies the requirements of Rule 121, Pa. R.A.P.

Date: April 4, 2000

/s/ John P. Cotter
John P. Cotter, Esquire
Attorney for Appellant
ANTHONY FLETCHER

**[J-192-1998]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA,<br>Appellee | : | 141 Capital Appeal Docket<br>Application for Reargument |
| v. | : | |
| ANTHONY FLETCHER,<br>Appellant | : | |

**ORDER**

PER CURIAM:

AND NOW, this 15th day of May, 2000, the Application for Reargument is DENIED.

## PENNSYLVANIA'S DEATH PENALTY STATUTE
## 42 Pa. C.S. § 9711

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE
PART VIII. CRIMINAL PROCEEDINGS
CHAPTER 97. SENTENCING
SUBCHAPTER B. SENTENCING AUTHORITY

Current through the 179th Regular Session, through amendments passed as part of Pennsylvania Session Laws 1995, Special Session 1 Act No. 1995-4 (H.B. 1).

Sec. 9711. **Sentencing procedure for murder of the first degree**

(a) **Procedure in jury trials.** – [1]

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death of life imprisonment.

(2) In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any *other* matter that the court deems relevant and admissible on the question of the sentence to be imposed. *Evidence* shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact

---

[1] The victim-impact provisions of 42 Pa. C.S. § 9711(a)(2), (b), and (c)(2) apply only to sentences imposed for offenses committed after December 10, 1995.

that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) **Procedure in nonjury trials and guilty pleas.** – If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) **Instructions to jury.** –

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be provided by the Commonwealth beyond a reasonable

doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.

(d) **Aggravating circumstances**. – Aggravating circumstances shall be limited to the following:

(1) The victim was a firefighter, peace officer, public servant concerned in official detention, as defined in 18 Pa.C.S. Sec. 5121 (relating to escape), judge of any court in the unified judicial system, the Attorney General of Pennsylvania, a deputy attorney general, district attorney, assistant district attorney, member of the General

Assembly, Governor, Lieutenant Governor, Auditor General, State Treasurer, State law enforcement official, local law enforcement official, Federal law enforcement official or person employed to assist or assisting any law enforcement official in the performance of his duties, who was killed in the performance of his duties or as a result of his official position.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. Sec. 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue.

(13) The defendant committed the killing or was an accomplice in the killing, as defined in 18 Pa.C.S. Sec. 306(c) (relating the liability for conduct of another; complicity), while in the perpetration of a felony under the provisions of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, (FN1) and punishable under the provisions of 18 Pa.C.S. Sec. 7208 (relating to drug trafficking sentencing and penalties).

(14) At the time of the killing, the victim was or had been involved, associated or in competition with the

defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. Sec. 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

(15) At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. Sec. 306(c), and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

(16) The victim was a child under 12 years of age.

(17) At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.

(e) **Mitigating circumstances**. – Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. Sec. 309 (relating to duress), or acted under the substantial domination of another person.

---

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY FOR THE FIRST
JUDICIAL DISTRICT OF PENNSYLVANIA CRIMINAL
TRIAL DIVISION

* * *

| | |
|---|---|
| COMMONWEALTH | MARCH TERM, 1992 |
| VS. | NO. 6001–MURDER |
| ANTHONY FLETCHER | –VOL. MANSLAUGHTER |
| | NO. 6002–INVOL MANSLAUGHTER |
| | NO. 6003–P.I.C. GENERALLY |
| | –P.I.C. CON. WEAPON |
| | NO. 6004–CARRY FIREARMS PUBLIC STREET/ PROPERTY |
| | –CARRY FIREARMS W/O LICENSE |
| | –CARRY FIREARMS W/O LICENSE/ AUTO |

* * *

WEDNESDAY, JANUARY 20, 1993
COURTROOM 285, CITY HALL
PHILADELPHIA, PENNSYLVANIA

* * *

BEFORE: THE HONORABLE ROBERT A. LATRONE, J.
(AND A JURY)

* * *

**C. V. ANTHONY FLETCHER** – 1-21-93

[8] A. AFTER TAKING HIS BIOGRAPHICAL INFORMATION, I TOLD –

Q. WHEN YOU SAY, HIS BIOGRAPHICAL INFORMATION, WHO ASKED THE QUESTIONS AND WHO GAVE THE ANSWERS?

A. I ASKED THE QUESTIONS AND RONALD WILLIAMS AND/OR SKEET GAVE THE ANSWERS.

Q. DID HE HAVE ANY PROBLEM GIVING YOU ALL THE BIOGRAPHICAL INFORMATION?

A. NONE AT ALL. I TOLD HIM WHY WE WERE QUESTIONING HIM, CONCERNING THE SHOOTING OF VAUGHN CHRISTOPHER, THE SHOOTING DEATH OF VAUGHN CHRISTOPHER. I ASKED THE QUESTION – I WROTE THE QUESTION DOWN; I ASKED HIM THE QUESTION AND HE ANSWERED IT UNTIL IT WAS COMPLETED.

Q. DO YOU HAVE A COPY OF THAT INTERVIEW IN FRONT OF YOU?

A. YES, SIR.

Q. EXPLAIN TO THE JURY TECHNICALLY THE PROCESS BY WHICH YOU ASKED THE QUESTIONS. HE GAVE THE ANSWERS AND YOU RECORDED IT ON THE PIECE OF PAPER; WHAT HAPPENED FIRST AND HOW DID YOU DO IT?

A. I WOULD WRITE THE QUESTION DOWN AND I WOULD ASK HIM THE QUESTION AND HE'D ANSWER THE QUESTION AND I WROTE IT DOWN AS HE GAVE IT TO ME.

Q. DID YOU WRITE DOWN YOUR QUESTIONS WORD FOR WORD?

A. QUESTION AND ANSWER, YES.

[9] Q. THE ANSWERS WERE WORD FOR WORD, AS WELL?

A. YES.

Q. THE ANSWERS WERE WRITTEN DOWN AT THE TIME HE GAVE THE ANSWER, NOT LATER?

A. NO, AT THE TIME.

Q. ALL RIGHT. READ INTO THE RECORD FOR THE LADIES AND GENTLEMEN OF THE JURY EACH AND EVERY QUESTION EXACTLY AS YOU ASKED IT AND EACH AND EVERY ANSWER AS HE ANSWERED IT?

A. YES, SIR.

"QUESTION: CAN YOU READ, WRITE AND UNDERSTAND ENGLISH.

"ANSWER: YES.

"QUESTION: HOW FAR DID YOU GO IN SCHOOL.

"ANSWER: ELEVENTH GRADE, AT BARTRAM HIGH SCHOOL.

"QUESTION: RIGHT NOW, ARE YOU UNDER THE INFLUENCE OF DRUGS OR ALCOHOL.

"ANSWER: NO.

"QUESTION: ARE YOU KNOWN BY ANY OTHER NAME?

"ANSWER: RONALD BROOKS AND SKEET.

"QUESTION: ON MONDAY MORNING, 3-2-92, AT ABOUT 12:59 A.M. VAUGHN CHRISTOPHER WAS SHOT AND DIED [10] INSIDE THE HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA –

THE COURT: WHAT DOES THAT READ?

THE WITNESS: "HUP AT 1:35 P.M. ON 3-2-92. WERE YOU PRESENT WHEN HE WAS SHOT?

"ANSWER: YES.

"QUESTION: WHO SHOT VAUGHN CHRISTOPHER?

"ANSWER: ANTHONY FLETCHER.

"QUESTION: HOW LONG HAVE YOU KNOWN ANTHONY FLETCHER?

"ANSWER: QUITE A FEW YEARS.

"QUESTION: WHAT WAS THE REASON FOR THIS SHOOTING?

"ANSWER: DOPE. VAUGHN TOLD ME THAT HE FUCKED UP A PACKAGE OF DOPE THAT BELONGED TO ANT, ANTHONY FLETCHER. HE SMOKED UP ALL OF THE CRACK IN THE PACKAGE

AND ANT, FLETCHER, NEVER SAID ANYTHING. ANT, FLETCHER, JUST WALKED UP ON VAUGHN AND SHOT VAUGHN.

"QUESTION: WHERE DID THIS SHOOTING TAKE PLACE?

"ANSWER: ON 60TH STREET, TWO HOUSES FROM MY HOUSE.

"QUESTION: WAS THERE ANY ARGUING BEFORE THE SHOOTING?

* * *

**C. V. ANTHONY FLETCHER** – 1-22-93

[114] Q. AFTER YOU TESTIFIED THAT DAY, DETECTIVE SCHOL TOOK YOU UP TO THE BENCH WARRANT UNIT; RIGHT?

A. YES.

Q. AND YOU BOTH KNEW ALL THE DATES FOR ALL THE NEW CASES; RIGHT?

A. YES, BUT THAT'S WHAT I WAS GOING TO DO, ANYWAY.

Q. BUT, YOU HAD NOT DONE IT AT THAT POINT; RIGHT?

A. RIGHT.

Q. YOU HAD BEEN A FUGITIVE FOR A LONG PERIOD OF TIME; RIGHT?

A. NO, YOU'RE NOT RIGHT.

Q. WELL, WHEN WE SAY THAT YOU WERE A FUGITIVE OR ON A BENCH WARRANT, THAT MEANS

YOU HAD SIGNED A SUBPOENA TO GO TO COURT AND YOU FAILED TO SHOW UP ON AT LEAST FIVE CASES; RIGHT?

A. YES.

Q. AND YOU ALSO HAD AN OPEN CASE FOR A PROBATION VIOLATION IN DELAWARE COUNTY?

A. NO, THAT WAS NO PROBATION.

Q. DID YOU HAVE AN OPEN CASE IN DELAWARE COUNTY?

A. YES, IT'S STILL ON.

Q. SO NOW, YOU HAVE SIX OPEN CASES RIGHT NOW –

A. YEAH, AND I AM GOING TO COURT FOR ALL OF THEM.

Q. DETECTIVE SCHOL, THE GOOD GUY, TAKES YOU AND HE GETS YOU ALL NEW DATES, WALKS YOU IN THE BENCH WARRANT

* * *

**C. V. ANTHONY FLETCHER** – 1-25-93

[25] BY MR. COSTANZO:

Q. MA'AM, DO YOU KNOW OF YOUR PERSONAL KNOWLEDGE WHY ANTHONY SHOT VAUGHN CHRISTOPHER?

A. BECAUSE VAUGHN HAD MESSED –

MR. PATRIZIO: OBJECTION, NON-RESPONSIVE. IS IT HER PERSONAL KNOWLEDGE.

MR. COSTANZO: JUST ANSWER THE QUESTION FIRST.

THE WITNESS: YES.

BY MR. COSTANZO:

Q. HOW DO YOU KNOW?

A. ANTHONY HAD GAVE VAUGHN A PACKAGE –

MR. PATRIZIO: OBJECTION, YOUR HONOR.

BY MR. COSTANZO:

Q. HOW DO YOU KNOW; DID YOU TALK TO ANTHONY ABOUT IT?

A. WHAT YOU MEAN, AS FAR AS HIM AND VAUGHN?

Q. YES.

A. NO, HE NEVER TALKED TO ME, BUT VAUGHN HAD TOLD ME.

THE COURT: SHE HAS NO PERSONAL KNOWLEDGE. WHAT VAUGHN TOLD HER WOULD BE HEARSAY.

MR. PATRIZIO: I MOVE TO STRIKE AND ASK THAT THE JURY THAT BE INSTRUCTED –

* * *

[77] AVENUE. I MADE A RIGHT HAND TURN ON 60TH STREET. I DROVE DOWN 60TH STREET TO GREENWAY AVENUE. I STOPPED TO TALK TO SOME DUDE WHO WANTED TO KNOW IF I WAS STILL BOXING. I TOLD HIM, 'YES, I'M STILL BOXING, BUT I

HAVE BEEN OUT FOR AWHILE'. I RODE FROM GREENWAY TO KINGSESSING. AS I WAS RIDING PAST, I SEEN THIS GUY SKEET. HE WAS STANDING NEAR THE TELEPHONE BOOTH ON 60TH STREET BETWEEN GREENWAY AND KINGSESSING. SKEET WAS WITH VAUGHN, THE GUY WHO WAS SHOT. I JUST RODE PAST AND SEEN THEM.

"I PARKED MY CAR NEAR THE CORNER BEFORE I GOT TO KINGSESSING ON 60TH STREET. I GOT OUT OF MY CAR AND WALKED BACK TO SKEET AND VAUGHN. ABOUT A WEEK BEFORE THIS, I WAS SHOOTING DICE A COUPLE OF BLOCKS AWAY AND VAUGHN AND TWO OTHER GUYS STUCK UP THE CRAP GAME. THEY TOOK ABOUT FIFTY SOME DOLLARS FROM ME. I HAD A LOT OF ONES. I RECOGNIZED VAUGHN'S FACE. WHEN I GOT TO VAUGHN, I PUNCHED HIM IN THE SIDE OF THE HEAD. I DIDN'T HAVE NO GUN OR NOTHING. AFTER I PUNCHED VAUGHN, HE PULLED OUT A GUN FROM UNDER HIS SHIRT. I SAW THE GUN WHEN HE STARTED TO PULL IT OUT. I RUSHED IN AND WE STRUGGLED. I GOT MY HAND ON THE GUN AND I FIRED IT TWO TIMES TOWARDS HIS LEG. HE BENT OVER BECAUSE I THINK HE WAS SHOT IN THE LEG. I FIRED TWO SHOTS, I THINK. AFTER THE SHOTS, I DROPPED THE GUN AND WALKED UP TO 5956 [78] SPRINGFIELD AND WENT IN MY HOUSE. I LEFT MY CAR PARKED ON 60TH STREET.

"QUESTION: DESCRIBE THE GUN YOU GOT IN THE STRUGGLE FROM VAUGHN?

"ANSWER: I REALLY DON'T KNOW. I NEVER REALLY LOOKED AT IT.

"QUESTION: BESIDES SKEET, WAS ANYONE ELSE PRESENT AT THE TIME OF THE SHOOTING?

"ANSWER: THAT WAS ALL I SEEN OUT THERE. WHEN I DROVE PAST, IT WAS ONLY THEM TWO STANDING THERE. WHEN I WALKED BACK, I DIDN'T SEE ANYONE ELSE.

"QUESTION: WHAT HAPPENED TO THE GUN AFTER YOU DROPPED OF [SIC] IT?

"ANSWER: I DON'T KNOW, PROBABLY SKEET PICKED IT UP AND TOOK IT HOME. I NEVER OWNED A GUN. I NEVER CARRIED A GUN.

"QUESTION: ANTHONY, WHAT IS SKEET'S FULL NAME, AGE, AND WHERE DOES HE LIVE?

"ANSWER: I ONLY KNOW HIM TO SEE HIM. I THINK HE'S – MY WIFE'S MOTHER'S SISTER MARRIED INTO THEIR FAMILY. HE'S LIKE COUSINS DOWN THE LINE.

"QUESTION: HOW LONG HAVE YOU KNOWN SKEET?

"ANSWER: ABOUT SIX YEARS. HE WAS IN JAIL FOR A WHILE. HE JUST CAME HOME.

* * *

**C. V. ANTHONY FLETCHER – 1-26-93**

[14] ARE IN BOTH ANTECUBITAL FOSSAE AND GROIN AND ALSO IN THE RIGHT SUBCLAVICULAR REGION. A SUTURED SURGICAL INCISION IS IN THE ABDOMEN ALONG THE MIDLINE. A CHEST TUBE IS ON THE RIGHT SIDE OF THE CHEST. THE LEFT LOWER CHEST SHOWED A THREE INCH BY ONE INCH CONTUSION. THE PENIS AND SCROTUM ARE EDAMATOUS. A URINARY CATHETER IS IN THE URETHRA. A TWO INCH BY ONE INCH OLD SCAR IS IN THE LEFT OF THE FRONT OF THE LEFT UPPER THIGH. ANOTHER OLD SCAR IS ON THE LATERAL ASPECT OF THE RIGHT THIGH. THE LEFT LOWER LEG SHOWS A FOUR INCH AREA OF HYPOPIGMENTED SCAR. OLD TATOOS ARE PRESENT IN BOTH UPPER ARMS AND LEFT FOREARM. A PENETRATING GUNSHOT OF THE RIGHT FLANK AND PERFORATING GUNSHOT WOUND OF THE RIGHT THIGH WILL BE DESCRIBED BELOW.

EVIDENCE OF INJURY. NUMBER ONE. PENETRATING GUNSHOT WOUND OF THE RIGHT FLANK.

ON THE RIGHT FLANK, 23 INCHES BELOW THE TOP OF THE HEAD AND 13 INCHES BELOW THE TOP OF THE SHOULDER, ALONG THE POSTERIOR AXILLARY LINE. THERE IS A GUNSHOT WOUND OF ENTRANCE WITH CIRCUMFERENTIAL MARGINAL ABRASION MEASURING THREE-EIGHTH OF AN INCH IN DIAMETER. SUBSEQUENT DISSECTION SHOWS THAT THE BULLET HAS COURSED [15] LEFTWARDS, FRONTWARDS AND SLIGHTLY UPWARDS,

ENTERING THE RETROPERITONEAL SPACE, INJURING THE RIGHT KIDNEY, WHICH WAS SURGICALLY REMOVED, ENTERING THE LIVER, LACERATING BLOOD VESSELS AT THE HILUM OF THE LIVER AND EXITING THE FRONT OF THE LEFT LOBE OF THE LIVER. THE BULLET HAS TRAVELLED FURTHER AND WAS RECOVERED FROM THE MUSCLES OF THE LEFT LOWER ANTERIOR CHEST WALL BENEATH THE RIB CAGE. THE BULLET IS A MEDIUM CALIBER, COPPER JACKETED ROUND NOSED AND MINIMALLY DEFORMED. THAT'S THE BULLET THAT WAS PLACED IN EVIDENCE AND EXAMINED LATER BY OFFICER FINOR. THE SKIN AROUND THE ENTRANCE WOUND SHOWS NO GUNPOWDER STIPLING OR DEPOSITS OF SOOT.

NUMBER TWO, PERFORATING GUNSHOT WOUND OF THE RIGHT THIGH.

ON THE RIGHT THIGH, SIX INCHES ABOVE THE KNEE, ALONG THE LATERAL ASPECT, THERE IS A GUNSHOT WOUND OF ENTRANCE MEASURING FIVE-EIGHTH OF AN INCH IN DIAMETER. THE BULLET HAS COURSED BACKWARDS AND DOWNWARDS, PENETRATING THE SKIN AND SUBCUTANEOUS TISSUES ONLY AND EXITING THROUGH THE IRREGULAR EXIT, FOUR INCHES ABOVE THE KNEE AND THREE INCHES AWAY FROM THE ENTRANCE WOUND.

INTERNAL EXAMINATION.

* * *

[18] DONE OF THE SPECIMENS OF BLOOD AND BASED ON THEIR EXAMINATION OF THE BLOOD, THEY FOUND THAT THERE WAS COCAINE IN THE BLOOD SYSTEM. DR. PARK WOULD BE ABLE TO TESTIFY THAT THE VICTIM INGESTED SOME AMOUNT OF COCAINE, BUT DOESN'T KNOW HOW MUCH, WITHIN AN HOUR OR TWO OF OF [SIC] HIS DEATH AND THAT THERE WAS COCAINE FOUND IN HIS BLOOD SYSTEM. THEY DON'T HOW MUCH HE TOOK, BUT THEY KNOW HE HAD TO TAKE SOME WITHIN AN HOUR OR TWO OF DEATH?

THERE WAS AN EXAMINATION DONE FOR ANY OTHER KINDS OF ANTI-DEPRESSANTS, ANTI-HISTAMINES, PCP AND OTHER STIMULANTS, AND THOSE WERE NEGATIVE.

SO, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, DR. PARK WOULD TESTIFY THAT THE IMMEDIATE CAUSE OF DEATH IN THIS CASE WAS THAT GUNSHOT WOUND OF THE RIGHT FLANK AND HE WOULD TESTIFY THAT THE MANNER OF DEATH IN THIS CASE WAS HOMICIDE.

THE COURT: SO AGREED.

MR. PATRIZIO: YES, YOUR HONOR, EXCEPT THAT THE DISTRICT ATTORNEY DID NOT READ ONE PORTION OF THE FIRST PARAGRAPH CONCERNING THE EXTERNAL EXAMINATION THAT DEALS WITH THE CLOTHING. NO CLOTHES WERE SUBMITTED FOR

* * *

Vol. VII

[134] MR. COSTANZO: The evidence to the one specific incident was that the defendant gave Vaughn a package of crack cocaine to sell and that Vaughn, rather than selling it, used it or spent the money for more, that's what the evidence is and the corroborative evidence from Natalie Grant about the defendant's activity at about the time of the killing or a month prior thereto was that the defendant in fact was seen by her on other occasions delivering packages of crack cocaine for sale at different drug houses throughout the neighborhood and in addition to that, he gave her his beeper number so that she could contact him if she found any houses for sale in the neighborhood that would be good for him and his business to sell drugs out of. That came from the witness' mouth, that is not from me. So, you make your own decision.

What the case is about, what the motive is about, when you are in that situation, when someone messes up a package on you, you make a mistake to give an addict something to sell and unfortunately their [135] addiction gets the best of them. You can't go to small claims court to say I want to sue you for my money back because how can you tell a judge that he owes you money from drugs? You can't do that and what kind of a business would you have out on the street if all your salesmen knew that I could not give you your money, I could mess up your package, I could use it myself and you're not going to be able to do anything about it. Now, what is going to happen to the business if that's what the word on the street is? See, you can't let that happen. Vaughn knew that. Remember how Skeet put it, ah, Vaughn fucked up

the package, excuse me, and Anthony didn't do nothing about it. See, that's what the word on the street was, that Anthony didn't do anything about the fact that Vaughn beat him for his package, beat him for his money and you can't be running no kind of business when the word on the street is he ain't going to do nothing about it, someone took him and he is not going to do nothing about it. He has to get the word out on the street. That is why the case is so overwhelming.

* * *

**C. V. ANTHONY FLETCHER – 1-29-93**

[57] IS CONCERNED.

NOW, THESE ARE GENERAL DISCUSSIONS ON SOME OF THE PRINCIPLES IN THE CASE THAT YOU WILL HAVE TO APPLY.

MOTIVE, WELL, IN MY INSTRUCTION INVOLVING FOLLOWING THAT, I WILL, IN EFFECT, GIVE YOU THE LEGAL DEFINITIONS OF THE CRIMES CHARGED AND EXPLAIN TO YOU THE ELEMENTS OF THE CRIMES CHARGED WHICH THE COMMONWEALTH MUST PROVE OR IS REQUIRED TO PROVE AS TO EACH AND EVERY ELEMENT BEYOND A REASONABLE DOUBT. MOTIVE IS NOT AN ELEMENT OR PART OF THAT DEFINITION OF A CRIME OR CRIMES. MOTIVE IS DEFINED AS SOME CAUSE OR REASON THAT MOVES THE WILL AND INDUCES ACTION. THE TERM MOTIVE IS USED TO REFER WITHOUT DISTINCTINO [SIC] TO EXTERNAL CIRCUMSTANCES OR TO INTERNAL, MENTAL OR PSYCHOLOGICAL STATES WHICH MOTIVATES A PERSON'S ACTIONS

OR CONDUCT. THUS MONEY, PROPERTY, GAIN, SOMETHING OF VALUE OR SPITE, HATRED OR ILL WILL CAN BE SPOKEN OF AS MOTIVES FOR A CRIMINAL ACT.

I GUESS THE EVIDENCE IN THIS CASE, AND YOU MAKE YOUR OWN DETERMINATION, WAS THAT THERE WAS A MOTIVE, A DRUG-RELATED TRANSACTION IN WHICH THE DEAL DIDN'T GO THROUGH AND I GUESS THEY [58] TALKED ABOUT THE DELIVERY OF THE COCAINE, SMOKING OF THE COCAINE BY THE DECEASED, SO I GUESS YOU CAN LABEL THE MOTIVE MONEY, REVENGE. YOU LABEL THEM.

YOU ARE INSTRUCTED THAT PROOF OF MOTIVE IS NEVER NECESSARY TO WARRANT A CONVICTION, BUT IT IS ALWAYS RELEVANT. THE COMMONWEALTH IS NOT REQUIRED TO PROVE A MOTIVE FOR THE COMMISSION CRIME OR CRIMES CHARGED AND THE FAILURE TO PROVE MOTIVE IS NOT FATAL TO THE COMMONWEALTH'S CASE. THIS DOES NOT MEAN THAT YOU ARE TO REJECT WITHOUT THOUGHT OR DISCUSS THE EVIDENCE RELATIVE TO MOTIVE. ALTHOUGH AS EXPLAINED, MOTIVE IS NEVER A PART OR SUBSTANTIVE ELEMENT OF THE DEFINITION OF THE CRIME, IT DOES HAVE VALUE AS CIRCUMSTANTIAL EVIDENCE FROM WHICH AN INFERENCE OF GUILT MAY BE DRAWN. KNOWLEDGE OF HUMAN NATURE TELLS US THAT AN ORDINARY PERSON IS MORE LIKELY TO COMMIT A CRIME IF HE OR SHE HAS A MOTIVE THAN IF HE HAS NONE. YOU SHOULD WEIGHT THE EVIDENCE TENDING TO SHOW MOTIVE ALONG WITH ALL THE

OTHER EVIDENCE. IN DECIDING GUILT OR INNOCENCE, IN THE ABSENCE OF MOTIVE, YOU MAY CONCLUDE, WITH ALL THE OTHER EVIDENCE IN THE CASE, THAT THE COMMONWEALTH HAS FAILED TO ESTABLISH THIS CASE BEYOND A REASONABLE

* * *

**C. V. ANTHONY FLETCHER – 2-1-93**

[57] A. YES.

Q. IS THAT THE TRUTH?

A. YES.

Q. NOW, YOU WERE GETTING HIGH WITH VAUGHN WHEN SUPPOSEDLY, HE TOLD YOU THAT HE HAD GOTTEN A PACKAGE FROM ANTHONY?

A. YES.

Q. AND THAT WAS TWO NIGHTS BEFORE?

A. YES.

Q. DID YOU SEE THE PACKAGE?

A. YES, I DID. I WAS SMOKING IT.

Q. SO, YOU SAW THE PACKAGE THAT YOU SAY ANTHONY GAVE TO VAUGHN?

A. WHAT I SMOKED, I PAID FOR.

Q. THAT'S NOT MY QUESTION.

A. HE TOLD ME HE HAD JUST GOT A PACKAGE FROM ANTHONY AND HE WANTED ME TO HELP HIM OUT SELLING IT.

Q. THAT VAUGHN WANTED YOU TO HELP HIM OUT SELLING IT?

A. HE WANTED ME TO HELP HIM GET SOME CUSTOMERS.

Q. YOU DON'T KNOW IF VAUGHN WAS TELLING YOU THE TRUTH; CORRECT?

A. NO, I DON'T.

Q. THAT'S BECAUSE SOMETIMES WHEN PEOPLE DO DRUGS, THEY DON'T ALWAYS TELL THE TRUTH ABOUT WHERE THEY GET

* * *

**C. V. ANTHONY FLETCHER – 2-3-93**

[6] STAGE, SO YOU WILL NOT BE PREJUDICED, BUT AT THE SENTENCING STAGE, NOW IS THE TIME THAT YOU KNOW EVERYTHING THERE IS TO KNOW ABOUT THE DEFENDANT SO THAT YOU CAN MAKE THE RIGHT DECISION ABOUT THE PENALTY. THE DEFENDANT IS PERMITTED TO SPEAK ON HIS BEHALF AND BRING PEOPLE TO SPEAK ON HIS OWN BEHALF AND THE JUDGE HAS ON OPEN BOOK AS THIS RECORD AND KNOWS WHO HE IS AND WHERE HE CAME FROM AND, THANK GOD, THAT YOU HAVE THAT INFORMATION, AS WELL, NOW. YOU MAY HAVE HAD CERTAIN OPINIONS FORMED AFTER THE VERDICT AS TO THE DEATH PENALTY OR NOT THE DEATH PENALTY OR LIFE IMPRISONMENT AND I THINK IT WAS IMPORTANT FOR YOU TO KEEP AN OPEN MIND. SO, YOU KNOW A HECK OF LOT MORE NOW THAN YOU DID WHEN YOU RETURNED YOUR VERDICT.

THE JUDGE WILL INSTRUCT YOU. THIS IS NOT A DECISION TO BE MADE OUT OF PASSION FOR EITHER SIDE OR PREJUDICE FOR EITHER SIDE. THIS IS A DECISION, AN IMPORTANT DECISION, AND I UNDERSTAND THAT IT IS GOING TO BE AN IMPORTANT DECISION AND YOU WILL TAKE IT AS SUCH. I DON'T WANT YOU TO MAKE A DECISION OUT OF FEAR OR SYMPATHY ABOUT ANYTHING. IN MY OPINION, COUNSEL MAY ASK YOU TO HAVE MERCY FOR THE DEFENDANT. FRANKLY, I DON'T THINK THIS IS THE TIME FOR [7] MERCY. I THINK THAT TIME IS LONG SINCE PAST AND THE DEFENDANT HAS NOT REALLY ACTED OUT A REQUEST FOR MERCY, IN THAT WHEN HE WAS ARRESTED, HE HAD A CHANCE TO TELL DETECTIVE DOUGHERTY WHAT HAPPENED AND IF HE WANTED MERCY, THAT WAS THE TIME TO ASK FOR MERCY. WHEN HE TOOK THE STAND YESTERDAY AND HAD PEOPLE TESTIFY ON HIS BEHALF, IF THERE WAS A REAL REASON FOR HIS ACTIVITIES IN DEALING DRUGS AND THERE WAS A REAL SENSE OF HONESTY AND TRUE REMORSE OF HIS KILLING OF VAUGHN CHRISTOPHER BECAUSE OF DRUG INVOLVEMENT, HE WOULD HAVE TOLD YOU; HE WOULD HAVE ADMITTED IT LIKE A MAN AND HE WOULD HAVE, AT THAT TIME, ASKED YOU FOR MERCY. BUT, THAT HAS NEVER HAPPENED IN THIS CASE, SO, I SUBMIT TO YOU, THE TIME FOR MERCY IS LONG SINCE PAST.

WHEN YOU'RE LOOKING FOR ANSWERS IN TERMS OF THE APPROPRIATE VERDICT, ALL OF YOU HAVE TOLD US ALREADY THAT YOU HAD AN OPEN MIND ON THE DEATH PENALTY AND IF IT WERE AN

APPROPRIATE CASE FOR THE DEATH PENALTY, YOU WOULD HAVE NO PROBLEM OR HESITANCY IN RETURNING THE DEATH PENALTY. I SUBMIT TO YOU THAT THIS IS AN APPROPRIATE CASE FOR THE DEATH PENALTY AND I WILL EXPLAIN TO YOU WHY.

* * *

---

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
PHILADELPHIA COUNTY
TRIAL DIVISION - CRIMINAL SECTION

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | SUPREME COURT No. 141 |
| v. | : | CAPITAL APPEAL DOCKET 1996 |
| ANTHONY FLETCHER | : | APPEAL FROM THE JUDGMENTS OF SENTENCE OF THE COURT OF COMMON PLEAS OF PHILADELPHIA AS OF MARCH TERM, 1992, Nos. 6001-6004 |

**OPINION**

**MAY 13 1997**

* * *

This Court did not err in forbidding the defendant from presenting evidence regarding his claim that this shooting occurred due to a gambling debt. Of course, a defendant may testify at the penalty phase on matters relevant to mitigation; however, a defendant cannot testify to exculpate himself from the prior verdict of guilt of murder of the first degree. Testimony regarding a defendant's guilt is no longer relevant at the sentencing phase. *Commonwealth v. Stokes*, 532 Pa. 242, 615 A.2d 704, (1992); *Abu-Jamal, supra*. In this case, the defendant's testimony

regarding his version of the events of this homicide constituted an attempt to exculpate from his previously discussed criminal culpability for a first-degree murder. Thus, pursuant to the case law cited above, such testimony was inadmissible. Therefore, this claim must be rejected.

(6)

Refusal to Strike the Testimony of Angelic Kirkman

The defendant argues that Angelic Kirkman, who testified for the Commonwealth at the penalty phase, was an incompetent witness. Pursuant to this argument, the defendant asserts that this Court erred in refusing to strike Kirkman's testimony. [N.T. dated 2/1/93 at pp. 23-77] This Court must disagree.

As discussed in Part III, Section (8), of this Opinion *supra*, it has been well established in this Commonwealth that, in general, the testimony of any person, regardless of his or her mental condition, is competent evidence unless it contributes nothing whatever because he is wholly untrustworthy. *Ware, supra*. Thus,

* * *

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

---

NO. 0141 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA
APPELLEE

VS.

ANTHONY FLETCHER
APPELLANT

ON APPEAL FROM the JUDGMENT OF SENTENCE OF COURT OF COMMON PLEAS, PHILADELPHIA COUNTY NOS. 6001, 6003 OF MARCH TERM, 1992 DATED FEBRUARY 21, 1996

BRIEF AND RECORD FOR APPELLANT

* * *

In further rebuttal, Officer Miller then testified that on April 13, 1992, he was present when the court found the defendant guilty of a drug offense arising out of the events for which he had arrested the defendant. (N.T., 2/2/93, pp 175-176).

Thereafter, both sides concluded their penalty-phase evidence.

On February 3, 1993, closing arguments were presented to the jury, although the court said that it would not give the jury any instructions beyond those which it had already been given during the trial state. (n.T., 2/3/93, p 3)

Suggesting that no mercy should be shown the defendant, counsel for the commonwealth told the members of the jury that:

> Commonwealth: " . . . When he took the stand yesterday and had people testify in his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse of his killing of Vaughn Christopher because of drug involvement, he would have told you; . . . " (N.T., 2/3/93, p 7)

While later urging the jury to believe that a mitigating factor existed, defense counsel told the jury that the case was "about drugs". (N.T., 2/3/93, p 24)

Later, in its charge to the jury, and in its discussion of aggravating versus mitigating circumstances, the Court described to the jury, seven separate fact patterns culled from various cases under which aggravating circumstances were deemed to have existed. Yet, when the Court discussed mitigating circumstances.

* * *

When the court told the jury that the defendant's motive related to drug activity, the court repeated to the jury contested statements read earlier by Detective Bova. Furthermore, the court's statements flatly contradicted those of the defendant, who claimed that the shooting arose over a gambling debt. For the court to repeat such testimony and tell the jury there was a drug-related motive was improper comment and demonstrated the court's bias toward the commonwealth's version of the events. As such, it constituted error by the court.

VII. THE COURT ERRED IN FAILING TO ALLOW THE DEFENDANT TO PRESENT EXCULPATORY EVIDENCE DURING THE PENALTY PHASE TO THE EFFECT THAT THE SHOOTING WAS NOT DRUG RELATED.

Offering evidence of mitigating circumstances concerning his character, record and circumstances of the offense. 42 Pa. C.S.A. 9711(E). COMMONWEALTH VS. BLYSTONE, 549 A.2d 81, 519 Pa. 450, cert. granted in part, BLYSTONE VS. PENNSYLVANIA, 109 S.Ct. 1567, 489 U.S 1096, 103 L.Ed.2d 934, aff'd. 110 S.Ct. 1078, U.S. 299, 108 L.Ed.2d 255. Jurors must consider any mitigating evidence presented by the defense in death penalty case, and defense counsel is permitted wide latitude in arguing the mitigating circumstances to the jury. COMMONWEALTH VS. DANIELS, 612 A.2d 395, 531 Pa. 210 (Pa. 1992).

The defendant maintained that the shooting concerned a gambling debt, and did not result because the decedent owned him money for drugs. The commonwealth, on the other hand, had introduced detective Bova's reading of a disavowed statement suggesting that the shooting occurred over a drug debt (N.T., 1/21/93, p 10), and described to the jury that involvement in drug-related activity could be considered an aggravating circumstance.

By precluding the defendant from giving testimony about the underlying crime, the court improperly precluded the defendant from giving relevant mitigating testimony.

VIII. THE COURT ERRED IN NOT STRIKING THE TESTIMONY OF A WITNESS WHO ADMITTED THAT SHE LIED IN HER TESTIMONY AND THAT HER RECOLLECTION OF THE EVENTS WAS DISTORTED DUE TO HER DRUG USAGE.

The competency of a witness is a matter for the trial judge to determine, and will not be disturbed absent an abuse of discretion. COMMONWEALTH VS. BAKER, 353 A.2d 454, 466 Pa. 479 (Pa. 1976). Whether an examination should be held to determine a witness's competency is within the sound discretion of the trial court. COMMONWEALTH VS. ROLISON, 374 A.2d 509, 473 Pa. 261, cert. denied, ROLISON VS. PENNSYLVANIA, 98 S.Ct. 215, 434 U.S. 8712, 54 L.Ed.2d 150 (Pa. 1977).

* * *

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY FOR THE FIRST
JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

* * *

| | | |
|---|---|---|
| COMMONWEALTH | : | MARCH TERM, 1992 |
| VS. | : | NO. 6001–MURDER |
| ANTHONY FLETCHER | : | –VOL. MANSLAUGHTER |
| | : | NO. 6002–INVOL MANSLAUGHTER |
| | : | NO. 6003–P.I.C. GENERALLY |
| | : | –P.I.C. CON. WEAPON |
| | : | NO. 6004–CARRY FIREARMS PUBLIC STREET/ PROPERTY |
| | : | –CARRY FIREARMS W/O LICENSE |
| | : | –CARRY FIREARMS W/O LICENSE/ AUTO |

* * *

PENALTY PHASE – (VOLUME II)
TUESDAY, FEBRUARY 2, 1993
COURTROOM 285, CITY HALL
PHILADELPHIA, PENNSYLVANIA
* * *

BEFORE: THE HONORABLE ROBERT A. LATRONE, J.
(AND A JURY)
* * *

* * *

[105] INDICATED TO ME THAT YOU WANT TO TESTIFY AT THIS STAGE OF THE PROCEEDINGS OF YOUR TRIAL; IS THAT CORRECT?

THE DEFENDANT: YES, SIR.

MR. PATRIZIO: AND HAVE I EXPLAINED TO YOU, SIR, THAT AS OF THIS POINT IN TIME, BASED UPON THE COURT'S RULING AND THE EVIDENCE THAT WE HAVE INTRODUCED, THAT THE JURY HAS NOT HEARD AND IS NOT AWARE OF A PRIOR CONVICTION OF YOURS CONCERNING ROBBERY AND ALSO, A PRIOR CONVICTION CONCERNING DRUG DEALING?

THE DEFENDANT: YOU EXPLAINED IT TO ME.

MR. PATRIZIO: BUT, SO FAR, THE JURY HAS NOT HEARD THAT. DO YOU UNDERSTAND?

THE DEFENDANT: YES.

MR. PATRIZIO: I HAVE TOLD YOU THAT ONCE YOU TESTIFY ABOUT ANYTHING, THE COMMONWEALTH, IN ALL LIKELIHOOD, WOULD TRY TO REBUT YOUR TESTIMONY WITH EVIDENCE OF YOUR CONVICTION CONCERNING ROBBERY. HAVE I TOLD YOU THAT?

THE DEFENDANT: YES, SIR.

MR. PATRIZIO: AND HAVE I ALSO TOLD YOU THAT BASED UPON THIS COURT'S RULING, YOU WILL NOT BE PERMITTED TO TESTIFY ABOUT THE FACTS OF THE [106] CASE THAT YOU ARE HERE ON TRIAL FOR AND THAT IF YOU ATTEMPT TO EXPLAIN THAT THIS WAS NOT A KILLING INVOLVING DRUGS, BUT ONE INVOLVING A DISPUTE AS A RESULT OF A ROBBERY OF A CRAP GAME, THAT HIS HONOR WILL NOT PERMIT TESTIMONY CONCERNING THAT. HAVE I EXPLAINED THAT TO YOU?

THE DEFENDANT: YES.

MR. PATRIZIO: HAVE I ALSO EXPLAINED TO YOU, SIR, THAT IN THE EVENT THAT WHILE YOU ARE TESTIFYING IN RESPONSE TO ANY QUESTIONS THAT I MAY ASK YOU, IF YOU PLACE YOUR CHARACTER INTO EVIDENCE, THAT THE COURT VERY WELL MAY RULE AND PERMIT THE COMMONWEALTH TO PRESENT EVIDENCE OF YOUR DRUG CONVICTION. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES.

MR. PATRIZIO: ALL RIGHT. KNOWING ALL OF THAT AND KNOWING THAT IT IS AGAINST MY

ADVICE THAT I HAVE GIVEN YOU TO TESTIFY, IT IS STILL YOUR DESIRE TO TESTIFY?

THE DEFENDANT: YES.

MR. PATRIZIO:

THE COURT: AND THAT IS YOUR OWN DECISION; IS THAT CORRECT?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: YOU WANT TO TAKE THE STAND

* * *

---

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

---

NO. 0141 CAPITAL APPEAL DOCKET

---

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

ANTHONY FLETCHER
Appellant.

---

**APPELLANT'S APPLICATION FOR REARGUMENT**

---

APPEAL FROM THE JUDGMENT OF SENTENCE OF
COURT OF COMMON PLEAS,
PHILADELPHIA COUNTY
NOS. 6001, 6003 OF MARCH TERM, 1992
DATED FEBRUARY 21, 1996

---

JOHN P. COTTER, ESQUIRE
ATTY. ID. NO. 20166
2541 SOUTH BROAD STREET
PHILADELPHIA, PA 19146
(215) 336-0343

**TABLE OF CONTENTS**

Page

TABLE OF AUTHORITIES ..... ii

BACKGROUND ..... 1

ORDER IN QUESTION ..... 1

REASONS FOR GRANTING REARGUMENT ..... 1

I. THE U.S. SUPREME COURT HAS SQUARELY RULED THAT THE TRADITIONAL HEARSAY EXCEPTION FOR "STATE OF MIND" EVIDENCE CANNOT BE USED TO ADMIT AN ALLEGED MURDER VICTIM'S OUT-OF-COURT STATEMENT RECALLING PAST FACTUAL EVENTS INCRIMINATING TO THE ACCUSED, AND THIS COURT'S CONTRARY INTERPRETATION OF THE HEARSAY EXCEPTION THEREFORE VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT ..... 2

A. The "State of Mind" Exception as Interpreted by this Court Does Not Qualify as a "Firmly Rooted Exception" to the Hearsay Rule ..... 4

B. The Commonwealth Has Not Demonstrated Any "Particularized Guarantees of Trustworthiness," Nor Does the Record Show any ..... 7

II. THE UNCONSTITUTIONAL ADMISSION OF THE DECEDENT'S ALLEGED STATEMENT CANNOT BE DEEMED HARMLESS BEYOND A REASONABLE DOUBT BECAUSE IT WAS THE PROSECUTION'S ONLY EVIDENCE TO PROVE ITS THEORY OF MOTIVE IN THE GUILT PHASE AND TO ESTABLISH ONE OF ITS TWO AGGRAVATING FACTORS TO OBTAIN THE DEATH SENTENCE ..... 8

CONCLUSION ..... 10

(2)

Supreme Court, U.S.
FILED
NOV 1 2000

NO. 00-258

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

ANTHONY FLETCHER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

---

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

---

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

RONALD EISENBERG
Deputy District Attorney
(*Counsel of Record*)
ANTHONY V. POMERANZ
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

36pp

## QUESTIONS PRESENTED

1. Was petitioner's claim that the trial court unconstitutionally restricted his testimony at the penalty hearing presented to or passed on by the court below?

(Not raised or considered in the court below.)

2. Where the trial court did not prevent petitioner from testifying that the murder was not drug related, was petitioner denied his right to testify?

(Not raised or considered in the court below.)

3. Was petitioner's claim that the trial court violated the confrontation clause by admitting Ronald Williams' statement presented to or passed on by the court below.)

(Not raised or considered in the court below.)

4. Where Ronald Williams' statement was admissible under two hearsay exceptions, did the court err in admitting the statement?

(Not raised or considered in the court below.)

5. Was petitioner's claim that the prosecutor unconstitutionally argued for a capital sentence presented to or passed on by the court below?

(Not raised or considered in the court below.)

6. Where the prosecutor did not criticize petitioner for failing to present his version of the offense; properly challenged the credibility of petitioner's testimony; and

did not improperly seek a capital sentence based on vengeance, were those remarks constitutionally impermissible?

(Not raised or considered in the court below.)

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented | i-ii |
| Table of Contents | iii-iv |
| Table of Authorities | v-viii |
| Opinion Below | ix |
| Jurisdiction | ix |
| Counter-Statement of the Case | 1-5 |
| Reasons for Denying the Writ | |
| I. Petitioner's claim that the court erroneously restricted his testimony at the penalty hearing is waived; it also fails to present a meritorious federal question. | 5-10 |
| II. Petitioner's claim that the trial court improperly admitted an alleged hearsay statement is waived; it also fails to present a meritorious federal question. | 10-19 |
| III. Petitioner's claim that the prosecutor committed misconduct in his penalty hearing closing argument is waived; it also fails | |

| | PAGE |
|---|---|
| to present a meritorious federal question. | 20-25 |
| Conclusion | 26 |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| **Federal Cases** | |
| Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028 (1997) | 12 |
| Barber v. Scully, 731 F.2d 1073 (2d Cir. 1984) | 17 |
| Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) | 15 |
| Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) | 12 |
| California v. Brown, 479 U.S. 538 (1987) | 25 |
| California v. Green, 380 U.S. 149 (1970) | 12 |
| Crane v. Kentucky, 476 U.S. 682 (1986) | 9,10 |
| Crawford v. United States, 212 U.S. 202 (1909) | 9 |
| Doyle v. Ohio, 426 U.S. 610 (1976) | 23 |
| Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1020 (1986) | 25 |
| Dutton v. Evans, 400 U.S. 74 (1970) | 13 |

| | PAGE |
|---|---|
| Duvall v. Reynolds, 139 F.3d 768 (10th Cir.), cert. denied, 525 U.S. 933 (1998) | 25 |
| Gregg v. Georgia, 428 U.S. 153 (1976) | 25 |
| Hanson v. Denckla, 357 U.S. 235 (1958) | 12 |
| Howard v. Moore, 131 F.3d 399 (4th Cir. 1997) | 24 |
| Illinois v. Gates, 462 U.S. 213 (1983) | 11,20,21 |
| Lilly v. Virginia, 527 U.S. 116 (1999) | 12,15,16 |
| Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998), cert. denied, 526 U.S. 1025 (1999) | 17 |
| Ohio v. Roberts, 448 U.S. 56 (1980) | 14 |
| Portuondo v. Agard, 120 S. Ct. 1119 (U.S. 2000) | 24 |
| Rock v. Arkansas, 483 U.S. 44 (1987) | 9 |
| Shepard v. United States, 290 U.S. 96 (1933) | 9 |
| United States v. Barone, 114 F.3d 1284 (1st Cir.), cert. denied, 522 U.S. 1021 (1997) | 14 |
| United States v. Brennan, 994 F.2d 918 (1st Cir. 1993) | 24 |

| | PAGE |
|---|---|
| United States v. Cabrera, 201 F.3d 1243 (9th Cir. 2000) | 24 |
| United States v. Chappell, 698 F.2d 308 (7th Cir.), cert. denied, 461 U.S. 931 (1983) | 15 |
| United States v. Gignac, 119 F.3d 67 (1st Cir.), cert. denied, 522 U.S. 975 (1997) | 6,19,20 |
| United States v. Matthews, 20 F.3d 538 (2d Cir. 1994) | 14,15,16 |
| United States v. McManaman, 653 F.2d 458 (10th Cir. 1981) | 15 |
| United States v. Ortiz, 422 U.S. 891 (1975) | 11,20,21 |
| United States v. Sasso, 59 F.3d 341 (2nd Cir. 1995) | 14,15,16 |
| United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) | 14 |
| United States v. Vretta, 790 F.2d 651 (7th Cir.), cert. denied, 479 U.S. 851 (1986) | 17 |
| United States v. Williams, 504 U.S. 36 (1992) | 11,20,21 |

**PAGE**

**State Cases**

Commonwealth v. Chandler, 554 Pa. 401, 721 A.2d 1040 (1998) 18

Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418, cert. denied, 525 U.S. 1015 (1998) 19

Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (2000) 4,8, 11,20

Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982) 18

Commonwealth v. Puksar, 559 Pa. 358, 740 A.2d 219 (1999), cert. denied (U.S. 10/2/00) 18

**Federal Statutes**

28 U.S.C. § 1257(a) ix

**State Statutes**

42 Pa.C.S.A. § 9711 (d) (7) 3,4

## OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reproduced at petitioner's Appendix A and is also reported at 561 Pa. 266, 750 A.2d 261 (2000).

## JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(a).

## COUNTER-STATEMENT OF THE CASE

Petitioner shot a man to death on a street corner for his failure to pay drug-trafficking proceeds. A Pennsylvania jury convicted petitioner of murder of the first degree and possessing an instrument of crime (Biils Nos. 6001, 6003, March Term, 1992). The jury sentenced petitioner to death. It found that in committing the offense petitioner knowingly created a grave risk of death to another person in addition to the victim of the murder; and that petitioner committed the murder to promote his drug activities.[1] Petitioner seeks certiorari.

Petitioner was a drug dealer in Southwest Philadelphia in March, 1992. At the beginning of that month, he consigned a package of crack cocaine to Vaughn Christopher, the victim, to sell. Christopher either smoked the crack himself or spent the money from the sale of the drugs; he failed to pay petitioner the proceeds. Sometime after midnight on March 2, 1992, Christopher was standing on a sidewalk in the 2000 block of South 60th Street talking to Ronald "Skeet" Williams and Natalie "Ne Ne" Grant. Petitioner approached the group and asked Christopher for the proceeds of the crack sale (N.T. 1/20/93, 22, 31; 1/21/93, 10-11; 1/22/93, 6-9; 2/1/93, 27-31, 57).

Before Christopher could respond, petitioner drew a silver .380 caliber semi-automatic pistol from beneath his jacket and fired a shot at Christopher's feet while Christopher stood next to Williams and Grant. Christopher began to flee; petitioner pursued. Petitioner aimed at Christopher and fired two more shots. One bullet struck the victim in the right flank and perforated his right kidney, liver and chest wall.

---

[1] The jurors found two mitigating circumstances.

The second bullet passed through the victim's right thigh. Christopher fell against a parked car. He called out to Williams for help; Williams declined to intervene (N.T. 1/19/93, 116; 1/20/93, 4; 1/21/93, 10-13, 57; 1/25/93, 90-94; 1/26/93, 12-15; 2/1/93, 25, 32-33).

Christopher careened down the street, turned the corner and stumbled down the 5900 block of Greenway Street, where he collapsed against a fence. Several minutes later, the police found him there, unconscious. Emergency personnel were summoned and rushed him to the hospital, where he was pronounced dead (N.T. 1/19/93, 63-69; 1/21/93, 11).

Petitioner left the murder scene, changed his clothes, and returned. Upon encountering Williams and Grant, he told them, "You all better tell that boy he better not tell who shot him." He then left the scene. Six days later, petitioner encountered Grant on a street corner. Referring to the murder, he said that he had been told that Grant was planning to "snitch" on him. Grant denied that she had spoken to the police. Petitioner told her that "Skeet" had told him he should kill her. Grant promised petitioner that she would not tell the police what she knew about the murder (N.T. 1/22/93, 13-17).

Several days later, petitioner came to Grant's home. Instead of threatening her again, he gave her money. A few days later, however, Grant heard that petitioner's friends were looking for her and that there was a planned "hit" on her, which she understood to mean a plan to murder her (N.T. 1/22/93, 17, 117; 1/25/93, 15).

After receiving information from witnesses to the murder, the police arrested petitioner. Petitioner waived his Miranda rights and gave a statement. He declared that he had

an altercation with the victim on the night of the murder. Petitioner, a former professional boxer, claimed that he punched the victim in the face in retaliation for the victim's robbery of him several days earlier. According to petitioner, the victim then drew a handgun, and petitioner grabbed him. During the struggle, the victim allegedly shot himself with his own gun (N.T. 1/25/93, 65-80).[2]

Petitioner was tried by a Pennsylvania jury sitting before the Honorable Robert A. Latrone. On January 29, 1993, the jury found petitioner guilty of murder of the first degree and possessing an instrument of crime. At the penalty hearing, the Commonwealth established the aggravating circumstances that in committing the offense petitioner knowingly created a grave risk of death to another person in addition to the victim of the offense;[3] and that petitioner committed the murder to promote his drug activities.[4] Petitioner sought to prove mitigation with evidence of his character and the circumstances of his offense;[5] and that he was under the influence of extreme mental or emotional

---

[2] Petitioner attempts to minimize the evidence of the drug-related nature of the murder (Petition at 3). However, as he notes in the Statement of the Case, further evidence that petitioner killed the victim for using petitioner's crack instead of selling it is provided by the fact that the victim had recently-ingested cocaine in his system at the time of his death (Petition at 2).

[3] 42 Pa.C.S.A. § 9711 (d) (7).

[4] 42 Pa.C.S.A. § 9711 (d) (14).

[5] 42 Pa.C.S.A. § 9711 (e) (8).

disturbance.[6] The jury found two aggravating and two mitigating circumstances. On February 5, 1993, the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances, and returned a verdict of death. Post-verdict motions were filed. New counsel was appointed and filed supplemental post-verdict motions. On December 26, 1995, after a hearing, the judge denied petitioner's post-verdict motions. On February 21, 1996, the judge formally reimposed petitioner's death sentence and imposed a concurrent two and one half to five year sentence for possessing an instrument of crime.

On appeal to the Pennsylvania Supreme Court, petitioner raised twenty-seven claims of error, including assertions that he was deprived of his right under Pennsylvania law to demonstrate that the murder was not drug related; that trial counsel was ineffective, under Pennsylvania law, for failing to object to the cross-examination of Ronald Williams with an alleged hearsay statement; and that trial counsel was ineffective, under Pennsylvania law, for failing to object to the prosecutor's assertion at the penalty hearing that the murder was drug related.

On March 24, 2000, the Pennsylvania Supreme Court affirmed petitioner's judgments of sentence. Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (2000). Petitioner filed an Application for Reargument, which was denied on May 15, 2000.

In this Court, petitioner claims, for the first time, that he was deprived of constitutional rights when he was allegedly prevented from testifying that the murder was not drug-related. Additionally, he changes his previous claim -- that

---

[6] 42 Pa.C.S.A. § 9711 (e) (2).

counsel was ineffective for failing to object to the examination of Ronald Williams with his alleged hearsay statement -- and instead argues that the Pennsylvania Supreme Court erred in approving the use of the statement. Finally, petitioner transforms another prior claim -- that trial counsel was ineffective for failing to object to the prosecutor's assertion at the penalty hearing that the murder was drug related -- into a claim that the prosecutor committed misconduct by commenting on petitioner's failure to explain the circumstances of the murder when he testified at the sentencing hearing; by allegedly commenting on petitioner's right to silence when he argued that petitioner's testimony was not really remorseful; and by urging the jury not to decide the penalty merely by exercising mercy on petitioner. Despite petitioner's attempt to invoke this Court's jurisdiction by re-fashioning his claims, no such claims were properly raised or preserved below, and none presents significant issues. Accordingly, review should be denied.

## REASONS FOR DENYING THE WRIT

### I. PETITIONER'S CLAIM THAT THE COURT ERRONEOUSLY RESTRICTED HIS TESTIMONY AT THE PENALTY HEARING IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner shot and killed Vaughn Christopher. He was convicted of murder of the first degree. Petitioner declined to testify at trial. At the penalty hearing, petitioner and his witnesses provided extensive testimony in support of mitigation, and denied that he had any involvement with drugs. The only limitation placed on his testimony was that he could not deny committing the murder altogether. Petitioner made no objection to this proper limitation. Instead,

he repeatedly denied any involvement with drugs, but understandably chose not to present the specific testimony that he now claims was excluded: that is, testimony that he really did murder the victim in cold blood, but that he did not do it because of drugs. Accordingly, because he did not object to the only limitation actually imposed by the trial judge, he may not have review of his claim. See United States v. Gignac, 119 F.3d 67, 69-70 (1st Cir.), cert. denied, 522 U.S. 975 (1997) (defendant's failure to object at trial to evidentiary ruling precludes appellate review).[7]

In any case, the claim does not present a meritorious federal question. The trial court did not improperly limit petitioner's testimony, and did not prevent him from conceding first degree murder while offering an alternative motive, as an examination of the record demonstrates.

At the outset of the penalty hearing, counsel advanced a series of motions that petitioner had asked him to make.[8]

---

[7] Petitioner makes no attempt to excuse his waiver of his claim; he simply asserts that the court erred, as if he had objected at the time. In reality, there was no objection at trial because the trial court never imposed the limitation petitioner now raises as error. See infra.

[8] These included, inter alia, an objection to the court's refusal to give a voluntary manslaughter instruction; a motion to reduce petitioner's conviction to murder of the third degree; a motion to preclude the prosecution from presenting evidence to support the aggravating circumstance involving endangering others in the course of the murder; a motion for a mistrial based on the introduction of Ronald Williams' statement; a motion to preclude the prosecution from proving the aggravating circumstance of a drug-related killing; and a motion for the appointment of new counsel (N.T. 2/1/93, 3-6).

Counsel then informed the court that he had told petitioner that he believed the court would not allow him to testify concerning "the facts" of the killing:

> I have advised [petitioner] that preliminarily ... if [petitioner] testified in this matter about the facts of the case in terms of what happened, that the court would prohibit that testimony....

N.T. 2/1/93, 7. The court, however, corrected counsel's assertion, indicating that it would only preclude testimony that was offered to exculpate defendant for the crimes of which he was convicted:

> The defendant trying to testify at the penalty stage in exculpation of his criminal culpability as to the charge for which he stands trial is an inappropriate area of inquiry and inadmissible evidence....
>
> * * * * * *
>
> He has the right to take the witness box in his own behalf, but he cannot testify to exculpate himself from the verdict of guilt.

N.T. 2/1/93, 7-9.[9] Petitioner then presented a penalty defense, including his own testimony. He chose not to present extensive testimony concerning the circumstances of the murder. He did, however, deny any involvement with drugs. He also specifically asserted both that he had turned down an offer from some Jamaican men to serve as a bouncer at a drug house and that he had never sold drugs (N.T. 2/2/93, 138-40, 145). Additionally, the jury knew from the admission at trial of petitioner's statement (which was incorporated into the record of the penalty hearing), that petitioner claimed that the murder arose from a prior robbery during a craps game and not from circumstances relating to drugs (N.T. 1/25/93, 76-80; 2/2/93, 20).[10]

Significantly, the only portion of the transcript petitioner cites to support his assertion that the trial court prevented him from testifying that the killing was not drug related is a colloquy between defense counsel and petitioner during which the court does not speak at all. During that

---

[9] Counsel then stated that he had advised petitioner that, if petitioner "were to suggest or testify that he was not a person engaged in drug-related activity, that on rebuttal, the Commonwealth would be permitted to introduce into evidence [petitioner's] prior conviction for drugs" (N.T. 2/1/93, 9).

[10] Petitioner reads the Pennsylvania Supreme Court's opinion to support his assertion that he was prevented from testifying that the murder was not drug-related (Petition at 12). He is mistaken. The Pennsylvania Supreme Court noted that petitioner's claim was that he was prevented from testifying that the shooting was not drug-related. However, the Court properly held that the trial court only prevented petitioner from testifying that he was not guilty of the murder. Nowhere did the Pennsylvania Supreme Court hold that petitioner was prevented from testifying that the shooting was not drug-related. Commonwealth v. Fletcher, 750 A.2d 261, 277.

colloquy -- in which counsel sought to persuade petitioner not to testify -- counsel mischaracterizes the nature of the court's ruling, portraying it as more limiting than it was (N.T. 2/2/93, 105-06). This is hardly support for the proposition that the court denied petitioner his right to testify. Moreover, the decision to focus petitioner's testimony on favorable elements of his character, and not to concede that he had in fact committed a cold-blooded murder but had done so over of a robbery during a craps game and not drugs, was well-chosen. It is unimaginable -- regardless of petitioner's argument that he could have defeated an aggravating circumstance with testimony that the murder was over gambling and not drugs -- that a jury would have been more sympathetic as a result of such testimony, and very likely both that the jury would have returned a capital sentence and that petitioner would now be challenging counsel's decision to have him concede committing the murder but disputing his motive.[11]

Petitioner's cases are factually distinguishable from this case. The transcript here shows that the trial court did not improperly restrict his penalty testimony. Thus, Rock v. Arkansas, 483 U.S. 44 (1987) (finding unconstitutional Arkansas' categorical prohibition of hypnotically-refreshed testimony); Crawford v. United States, 212 U.S. 202 (1909) (non-constitutional decision holding that an accused may testify at a trial about his motive in taking an action); and Crane

---

[11] Petitioner makes a related meritless assertion that the prosecutor was improperly permitted to "relitigate" petitioner's drug-related motive by presenting evidence at the penalty hearing of his involvement with drugs (Petition at 13). Because the prosecutor was seeking the application of the aggravating circumstance pertaining to a drug-related killing, evidence of petitioner's connection with drugs was relevant and admissible at the penalty hearing. Petitioner was free to address the issue as well.

v. Kentucky, 476 U.S. 682 (1986) (that a confession has been found voluntary by a judge prior to trial does not preclude a trial challenge of the reliability of the confession; it is the jury's role to determine witness credibility), do not avail him. Petitioner was entitled to testify to the applicability of aggravating and mitigating circumstances, including the circumstances of the offense. The court did not prevent him from doing so; he was free to admit the murder but claim it arose from a non-drug motivation. He in fact did present evidence that he was not involved in drug-selling, and the jury had before it his statement that the killing arose out of a gambling dispute. That petitioner chose not to do more is in no way akin to a ruling that prevented him from doing so.

## II. PETITIONER'S CLAIM THAT THE TRIAL COURT IMPROPERLY ADMITTED AN ALLEGED HEARSAY STATEMENT IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner asserts that the Pennsylvania Supreme Court violated the confrontation clause by approving the admission of the victim's statement to Ronald Williams that he had smoked some drugs he was supposed to sell for petitioner (Petition at 13-20).[12] This claim is unreviewable for multiple reasons. First, petitioner raised no such claim of court error below; instead he claimed only that trial counsel was ineffective for failing to object to the cross-examination of Williams with the victim's alleged hearsay statement, thereby explicitly conceding his failure to object to the introduction of the statement at trial. The Pennsylvania Supreme

---

[12] The victim had actually told Williams "that he had f_ed up a package of dope that belonged to [petitioner]. He smok[ed] up all the crack in the package[.]"

Court reviewed and rejected petitioner's claim as a claim of ineffective assistance of counsel. Commonwealth v. Fletcher, 750 A.2d at 275-76. Petitioner's claim that the statement's admission constitutes court error is therefore raised for the first time in this Court and is, therefore, unreviewable. United States v. Williams, 504 U.S. 36 (1992); Illinois v. Gates, 462 U.S. 213 (1983); United States v. Ortiz, 422 U.S. 891 (1975).

Moreover, even in the guise of his ineffective assistance claim, petitioner did not assert a violation of the confrontation clause below; his claim addressed only Pennsylvania law.[13] For this reason as well, petitioner's claim is improperly presented to this Court and unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.[14]

---

[13] In his brief to the Pennsylvania Supreme Court, referring to the trial testimony of Ronald Williams at N.T. 1/29/93, 36-44, petitioner claimed that his "trial counsel was ineffective in failing to object to hearsay testimony...describing a motive for the shooting" (emphasis supplied). In his argument, petitioner related that a statement introduced on cross-examination indicated that the victim had "received from [defendant] a package of drugs but failed to account for the proceeds thereof." Petitioner complained that "Such testimony was clearly hearsay, but defense counsel did not object thereto." Petitioner's ineffectiveness claim did not mention any constitutional theory of denial of confrontation rights. The sole and very specific basis of the ineffectiveness claim was trial counsel's failure to object to "hearsay testimony." This invoked the state law of evidence, not the confrontation theory to which petitioner now turns in hindsight. Petitioner's brief did not even mention the word "confrontation."

[14] Petitioner's assertion, in a post-appeal petition for

(Continued)

That petitioner raised an unsuccessful ineffectiveness claim based on a hearsay theory on appeal does not entitle him to raise, on petition to this Court, an entirely new claim (based in significant part on Lilly v. Virginia, 527 U.S. 116 (1999), handed down years after the supposed ineffectiveness took place) based on a confrontation theory. As explained by this Court in California v. Green, 380 U.S. 149 (1970), a hearsay theory is not a confrontation theory:

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different

---

(Continued)

reargument, of a Confrontation Clause violation does not preserve the claim. This Court has repeatedly refused to consider claims that are raised for the first time in a petition for rehearing when the state court has summarily denied the petition, as here. Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 1031 n.3 (1997); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987); Hanson v. Denckla, 357 U.S. 235, 244 n.4 (1958). The Pennsylvania Supreme Court did not address the reargument's newly-asserted federal claims. Petitioner may not have review of them in this Court.

Petitioner cannot revive his waived claim by asserting that the Pennsylvania Supreme Court implicitly considered his claim in its review to determine whether the capital sentence was the result of "passion, prejudice, or any other arbitrary factor" (Petition at 8 n.3). The Court considered the claim petitioner raised. There is absolutely no reason to believe it considered and silently rejected a federal claim petitioner did not assert, while simultaneously ignoring the fact that it arose as an ineffectiveness claim.

> thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception ... the converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

380 U.S. at 155-56; Dutton v. Evans, 400 U.S. 74, 81-82 (1970).

Petitioner's claim, even had it been preserved, would not present a meritorious question. The confrontation clause was not offended by the admission of the victim's statement to Williams about messing up the drugs under either of two established exceptions to the hearsay rule, admissions against interest and state of mind.

The confrontation clause permits the admission of hearsay statements against a defendant, despite his inability

to confront the declarant at trial, where the declarant is unavailable and the statement bears adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66 (1980). Where a declarant makes a statement inculpating both himself and another, with no attempt to limit his own exposure to criminal liability, his statement will be regarded as a firmly-rooted exception for confrontation clause purposes. United States v. Barone, 114 F.3d 1284, 1302 (1st Cir.), cert. denied, 522 U.S. 1021 (1997). As the Second Circuit has repeatedly held, a statement incriminating the declarant and another person possesses adequate reliability if it is made to an ally, rather than a law enforcement officer, and the circumstances surrounding the inculpation of the other person provide no reason to suspect that that portion is less reliable than the part that incriminates the declarant. Such reliability is present where the statement is volunteered by the declarant to a friend, with no coercive pressures from or attempt to curry favor with authorities; no reason to expect that his admission will ever be disclosed to authorities; and no attempt to shift blame or minimize his own culpability. United States v. Sasso, 59 F.3d 341, 349 (2nd Cir. 1995), citing United States v. Matthews, 20 F.3d 538, 546 (2d Cir. 1994).[15]

The circumstances justifying the admission of a statement against interest as a firmly-rooted hearsay exception are present in the declarant's statement to Ronald Williams. Ronald Williams was friendly with petitioner, whom he knew as "Ant Man." The declarant's confiding to Williams that he had messed up a package of crack belonging to petitioner was clearly not made under the desire to curry favor with authorities or with the expectation that Williams,

---

[15] The same analysis applies under Federal Rule of Evidence 804(b)(3). United States v. Shukri, 207 F.3d 412, 417 (7th Cir. 2000).

petitioner's friend, would disclose it to the authorities. Petitioner was not on trial for drug possession and the declarant had nothing to gain from implicating him. The statement was assuredly not made with the knowledge that petitioner would subsequently murder the declarant. Moreover, the declarant's statement made no attempt to shift blame or minimize his responsibility for drug activity; he admitted possession and use of the crack (N.T. 1/20/93, 22-23; 1/21/93, 10-11). He had no reason to inculpate himself in a crime if the statement were not true. The declarant undoubtedly had personal knowledge of the truth of the matter he spoke about, he volunteered the statement and there is no reason to suspect he was not telling the truth. Thus, the self-incriminating nature of the statement, and the circumstances under which it was made, enable it to pass confrontation clause muster as an admission against interest, both as a firmly-rooted exception and because the statement contains sufficient indicia of reliability. United States v. Sasso, supra (declarant's statement to girlfriend implicating self and defendant admissible under firmly rooted hearsay exception as admission against interest); United States v. Matthews, supra (same); United States v. McManaman, 653 F.2d 458, 461 (10th Cir. 1981) (emphasizing importance of declarant's personal knowledge of events); Barker v. Morris, 761 F.2d 1396, 1402 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) (emphasizing importance of voluntary nature of statement); United States v. Chappell, 698 F.2d 308, 313 (7th Cir.), cert. denied, 461 U.S. 931 (1983) (emphasizing importance of declarant's lack of motivation to lie).[16]

---

[16] In his discussion of the state of mind exception, addressed infra, petitioner cites Lilly v. Virginia, 527 U.S. 116 (1999), for the proposition that declarations against interest are not firmly-rooted exceptions to the rule against the admission of hearsay

(Continued)

In addition, the declarant was obviously reporting his own state of mind. His statement expressed his concern and apprehension that petitioner had reason to be angry with him, because he had "smoked up" drugs he had obtained from

---

(Continued)

(Petition at 16-17). Petitioner's reliance is misplaced. First, the portion of the Lilly opinion on which petitioner relied is a plurality opinion and has no precedential value. Second, Lilly was decided long after petitioner's trial and could not have been anticipated. Third, the Lilly plurality discussion does not declare that all declarations against interest are not firmly-rooted hearsay exceptions. Instead, it divides declarations against penal interest into three types: (1) voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence of the guilt of an alleged accomplice of the declarant. The plurality declares the first type of statement to be a firmly-rooted exception; that the second type, traditionally offered by the accused, does not implicate the confrontation clause; and that the third type - accomplices' confessions that inculpate a criminal defendant - is not a firmly rooted exception.

The victim's statement to petitioner's friend is most akin to a statement of the first type. It was not a confession to police, it did not attempt to minimize the victim's responsibility for the drug offense, and it did not attempt to exculpate petitioner. In implicating himself in a drug offense, the victim could not possibly have known that his words would later implicate defendant in a murder in which he would be the victim. Moreover, the courts that have analyzed the specific factual situation presented by the victim's statement here -- an admission of declarant's and someone else's criminal wrongdoing to a friend, with no attempt to diminish the declarant's own responsibility and no expectation that the admission will be conveyed to the police -- have found that the statement constitutes a firmly-rooted hearsay exception. United States v. Sasso, supra; United States v. Matthews, supra.

petitioner. This qualified the statement under a second, equally sound hearsay exception, the state of mind exception to the hearsay rule; his mental state suggested a motive for petitioner to have killed him. See, e.g., Moore v. Reynolds, 153 F.3d 1086, 1107 (10th Cir. 1998), cert. denied, 526 U.S. 1025 (1999) (victim's statement that he feared appellant admissible in appellant's trial for his murder under the state of mind exception to the hearsay rule; and opining that state of mind is a firmly rooted hearsay exception); Barber v. Scully, 731 F.2d 1073 (2d Cir. 1984) (victim's statement that she feared appellant was admissible evidence of her state of mind on charge of larceny of car by appellant because it tended to show whether she would have given him permission to use her car). See also United States v. Vretta, 790 F.2d 651, 660 (7th Cir.), cert. denied, 479 U.S. 851 (1986) (confrontation clause not offended by admission of victim's reports that the appellant had been threatening him in appellant's prosecution for the victim's murder).

Moreover, even if the court had erred in admitting evidence of the victim's statement to Williams, no relief would be due. As already explained, petitioner's conviction was not the product of the victim's statement that he had messed up a package of drugs for petitioner, but of the testimony of an eyewitness that petitioner walked up to the victim, confronted him and shot him repeatedly.[17]

[17] Petitioner asserts that Shepard v. United States, 290 U.S. 96 (1933), defeats the admission of the victim's statement. In Shepard, a doctor was convicted of poisoning his wife on the basis of her statement, made to a nurse just before her death, "Dr. Shepard has poisoned me." The Shepard decision makes no mention of the confrontation clause, for the simple reason that the confrontation clause was not in issue. The Shepard court held, as a matter of the law of **evidence**, that the statement, "Dr. Shepard

(Continued)

Indeed, the testimony in question here not only failed to offend the confrontation clause, the same result would apply even under Pennsylvania law. The declarant's statement was admissible as both an admission against penal interest, Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982) (declarant's statement that he had conspired with appellant to commit arson at appellant's trial for murdering declarant admissible as admission against penal interest), and under the state of mind exception, Commonwealth v. Puksar, 559 Pa. 358, 368 n.6, 740 A.2d 219, 225 n.6 (1999), cert. denied, (U.S. 10/2/00) (victim's statement that he did not trust appellant and that the victim and appellant were involved in a dispute admissible evidence of state of mind); Commonwealth v. Chandler, 554 Pa. 401, 411, 721 A.2d 1040, 1045 (1998) (murder victim's statement to her mother regarding breakdown in relationship with accused admissible

---

(Continued)

has murdered me" was not admissible under the state of mind exception, where it was erroneously offered as a dying declaration, and referred to "a past act, and, more than that, to an act by some one not the speaker." 290 U.S. at 105.

Further, Shepard is factually inapposite to this case. Here, the declarant referred only to his own actions, not past actions of the defendant. He referred to his own actions, moreover, only to explain his own contemporaneous state of mind, and in so doing incriminated himself in a drug crime. The statement here was not merely admissible, it was unusually reliable.

Petitioner's citation to Shepard for the additional proposition that the jury's having heard the victim's "voice beyond the grave" added to the alleged prejudice (Petition at 19), is misplaced. Unlike the voice in Shepard, the victim was not heard posthumously to accuse petitioner of murdering him, but to admit to drug-dealing with a friend.

as state of mind); Commonwealth v. Collins, 550 Pa. 46, 58-60, 703 A.2d 418, 424-25, cert. denied, 525 U.S. 1015 (1998) (victim's statement that appellant had shot her in the past and would shoot her in the head if she messed up a drug package admissible as state of mind).

Finally, in addition to the confrontation clause claim, petitioner also throws in a one-paragraph argument that the trial judge's jury charge was improper because he allegedly opined that the testimony concerning the drug deal established motive (Petition at 20). Petitioner failed to object to the court's instruction at trial, thereby waiving any possible claim. United States v. Gignac, supra.

Additionally, the court thoroughly and repeatedly instructed the jurors that they were the finders of fact, notwithstanding any comments by the court or the attorneys. The court further instructed the jury to disregard any statement of the court that did not accurately reflect its own recollection (N.T. 1/19/93, 34; 1/29/93, 28, 30-38). Finally, after summarizing the prosecution's evidence of motive, the court emphasized that:

> [Y]ou [the jurors] make your own determination... It is entirely up to you to determine what weight, if any, should be given to the evidence concerning motive in this case.

N.T. 1/29/93, 57-59). Accordingly, there is no merit to petitioner's claim.

## III. PETITIONER'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT IN HIS PENALTY HEARING CLOSING ARGUMENT IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner claims that the prosecutor committed misconduct of constitutional proportion during his comments at the penalty hearing (Petition at 20-25). Petitioner's claims are unreviewable. Petitioner raised no objection at trial to the remarks he now assails on multiple grounds. Accordingly, petitioner may not have review of his claims that the prosecutor violated the constitution. United States v. Gignac, supra. Indeed, petitioner claimed in his state court appeal that trial counsel was ineffective for failing to object to the prosecutor's remarks, thereby explicitly conceding his failure to object to them at trial. The Pennsylvania Supreme Court reviewed and rejected petitioner's claim as a claim of ineffective assistance of counsel. Commonwealth v. Fletcher, 750 A.2d at 280. Petitioner's present claim that the remarks were reversible error in themselves is therefore raised for the first time in this Court and, therefore, unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.

The claims are unreviewable for an additional reason: petitioner's ineffective assistance challenge regarding the remarks was different than his present argument about them. Petitioner claimed below that trial counsel was ineffective because the prosecutor's remarks about petitioner's drug motive were irrelevant and prejudicial, and therefore improper as a matter of Pennsylvania law. Commonwealth v. Fletcher, 750 A.2d at 280. Now petitioner is claiming that the prosecutor violated the federal constitution by commenting that petitioner failed to explain the circumstances of the

crime; that petitioner lacked remorse; and that the jury should exercise vengeance toward petitioner. Thus, even putting aside petitioner's abandonment of the ineffective assistance theory that was the only claim preserved below, petitioner's present constitutional attacks on the prosecutor would still be new, and are therefore unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.

Even if reviewable, petitioner's claims would not present a meritorious federal question. Petitioner first asserts that the prosecutor improperly commented on his failure to explain the circumstances of the offense, particularly in light of the trial court's alleged ruling prohibiting him from discussing those circumstances. That is not what happened. At the outset of his penalty hearing testimony, petitioner stated that he wanted to pay his respects to the victim's family. He returned to that subject at the conclusion of his direct testimony, and explained that he felt "hurt" at the victim's death, and later declared, "I feel sorry for the family. I know they wish he was here and I wish personally he was here. I swear to God, I wish he was here." Petitioner also denied that he had any involvement with drugs, denied selling drugs and asserted that he had declined an offer to serve as a bouncer at a drug house (N.T. 2/2/93, 115, 128, 138-39, 145).

In that context, it is clear that the prosecutor's remarks did not criticize petitioner for failing to explain the circumstances of the murder or for exercising his constitutional right to silence, and did not constitute an appeal to vengeance. Rather, the prosecutor criticized the testimony petitioner did offer on those matters as being insincere:

> When [petitioner] took the
> stand yesterday and had people

> testify on his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse about his killing of [the victim] because of drug involvement, he would have told you; he would have admitted it like a man and he would have, at that time, asked you for mercy. But, that has never happened in this case, so, I submit to you, the time for mercy is long since past.

N.T. 2/3/93, 7.[18]

As previously addressed in response to petitioner's first claim, the court did not prohibit petitioner from offering his version of the offense; the court merely held that he could not attempt to exculpate himself by denying the murder altogether. Additionally, the prosecutor's remarks went not to petitioner's failure to explain the circumstances relating to the murder, but rather to the credibility of the explanation he did offer, namely his assertion that he was not involved with drugs. Accordingly, the prosecutor's remarks were proper.

---

[18] The prosecutor concluded by stating:

> I'm not here to beg you to do anything or try to influence you to do anything. I submit to you, if you follow the law, you will do what's right for all involved here.

N.T. 2/3/93, 15.

Petitioner cites Doyle v. Ohio, 426 U.S. 610 (1976), for the proposition that a prosecutor cannot prevent a defendant from testifying as to the facts of a case and then criticize him for not testifying. In that case, the defendant's rights were found to have been violated where he exercised his Miranda right to remain silent, then testified at trial that he had been "framed," and the prosecutor impeached his trial testimony by asking him why he had not mentioned being "framed" upon his arrest. Here, the prosecutor did not prevent petitioner from testifying that the murder was not drug-related. Moreover, his attack was on the testimony petitioner offered at the penalty hearing. He did not criticize petitioner's failure to give that testimony at an earlier stage.

Nor did the prosecutor's remark implicate petitioner's right to silence for failing to express remorse. The prosecutor's criticism was directed at the nature of the remorse to which petitioner testified, and properly anticipated petitioner's argument for mercy. Defense counsel's closing argument, in which he explained that the reason petitioner testified was to express his remorse, precludes the possibility that the jury would have misinterpreted the prosecutor's remarks as a reference to silence based on an alleged failure to express remorse:

> [M]y first question to [petitioner] was "Tell me about your boxing career," and the thing that he wanted to say and the thing that he wanted to tell you and the thing that he wanted to tell the victim's family was that he was sorry and was remorseful for what he did.... So, I submit to you that

> when [the prosecutor] stands up and says to you, you learned a whole lot more [about petitioner's prior crimes], you learned about that because [petitioner] wanted to place before you his remorse for what he did.
>
> * * * * * *
>
> [Petitioner] wanted to express his remorse to the victim's family. Remorse, in and of itself, I believe, is in this situation a mitigating circumstance.

N.T. 2/3/93, 19, 30. A prosecutor may attack the sincerity of the account of events a defendant provides without thereby implicating his right to silence. Howard v. Moore, 131 F.3d 399 (4th Cir. 1997) (prosecutor's remark that defendant had not shown remorse was proper comment on the evidence presented and fair response to defense counsel's argument that defendant was indeed remorseful). See Portuondo v. Agard, 120 S.Ct. 1119, 1125 (U.S. 2000) (when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any witness); United States v. Cabrera, 201 F.3d 1243, 1250 (9th Cir. 2000) (same); United States v. Brennan, 994 F.2d 918, 926 (1st Cir. 1993) (same). As explained, the prosecutor criticized the expressions of remorse petitioner offered; he did not chastise him for failing to offer any remorse.

Next, petitioner asserts that the prosecutor's assertion that the time for mercy had passed violated due process. The

authority he cites does not support his argument. California v. Brown, 479 U.S. 538 (1987), holds that an instruction that the jury must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not violate the Eighth Amendment. Nor does the non-precedential plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976), state that due process is violated by an argument such as the prosecutor made here. Finally, Drake v. Kemp, 762 F.2d 1449, 1458 (11th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), is wholly distinguishable from this case. There, the prosecutor was found to have invoked vengeance where he read a quote from a century-old state supreme court case stating in part that "the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society.... We have had too much of this mercy."

The prosecutor's argument in this case is readily distinguishable from that condemned in Drake. The prosecutor did not invoke the authority of prior supreme court decisions; his argument was not graphic; he did not argue that mercy was never appropriate; he simply argued that the jury should not apply mercy to petitioner.[19] Cf. Duvall v. Reynolds, 139 F.3d 768, 795 (10th Cir.), cert. denied, 525 U.S. 933 (1998) (due process not violated even where prosecutor stated that the court had spent four days guaranteeing defendant's right to instructions on mitigation, fairness and mercy and that defendant was treated "much more fairly, and with much more mercy than he showed [the victim]...."). Accordingly, petitioner is not entitled to the grant of certiorari.

---

[19] Moreover, Drake was not a constitutional decision.

## CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
ANTHONY V. POMERANZ
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD H. GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

(3)

No. 00-258

In The

# Supreme Court of the United States

ANTHONY FLETCHER,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Pennsylvania Supreme Court**

## REPLY BRIEF

JEROME J. SHESTACK*
JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

*Counsel for Petitioner, Anthony Fletcher*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9pp

## INTRODUCTION

Petitioner Anthony Fletcher seeks review on certiorari of constitutional issues that were actually adjudicated and decided by the Pennsylvania Supreme Court, including: (1) whether the trial court violated Fletcher's right to testify and to present a defense at the capital-sentencing hearing by forbidding him from testifying that the killing was not drug-related, when drug-related motivation was one of the two aggravating factors used to obtain the death sentence; and (2) whether the trial court violated Fletcher's Sixth Amendment right to confront adverse witnesses by admitting the decedent's alleged out-of-court statement suggesting that the motive for the killing was drug-related without any indicia of the statement's reliability. In his brief to the Pennsylvania Supreme Court, Fletcher specifically challenged those trial-court errors and cited authority grounded in his constitutional rights to present mitigating evidence and to confront adverse witnesses.

Those issues are properly before this Court. The Commonwealth of Pennsylvania argues that Petitioner waived his right to bring his claims before this Court because he did not separately enumerate the constitutional grounds in his brief to the Pennsylvania Supreme Court. The cases that Fletcher cited in his brief to the Pennsylvania Supreme Court, however, cite and rely on United States constitutional precedents, and therefore properly raised the constitutional issues. The Commonwealth's claims of waiver have no merit.

Moreover, the Commonwealth inaccurately portrays the trial judge's rulings below in an effort to obscure the real impact they had on Fletcher's ability to challenge the aggrevating circumstances that supported his death sentence. Forbidden from "presenting evidence regarding his claim that this shooting occurred due to a gambling debt," as the trial judge himself put it, Fletcher was unable to challenge the prosecutor's claim during the

sentencing hearing that the confrontation with the decedent was drug-related. This Court should therefore grant certiorari for the reasons stated in Fletcher's Petition.

## I. FLETCHER PROPERLY RAISED A CONSTITUTIONAL CHALLENGE TO IMPROPER RESTRICTIONS ON HIS TESTIMONY BELOW

During the capital-sentencing phase, Petitioner was precluded from presenting testimony that the shooting of the decedent was not drug-related. In his brief to the Pennsylvania Supreme Court, Petitioner challenged the trial court's order *in limine* preventing him from presenting such testimony. Appendix at 70a. In his argument, Fletcher cited this Court's decision in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S. Ct. 1078, 108 L.Ed. 2d 255 (1990), for the proposition that jurors must be given access to "any mitigating evidence presented by the defense in the death penalty phase." This Court's ruling in *Blystone*, of course, relies on federal constitutional law. Because Fletcher preserved his challenge to the trial judge's order *in limine* on constitutional grounds, the issue is now properly before this Court.

The Commonwealth claims that the issue is waived because Fletcher supposedly did not object at trial to the restrictions on his testimony. No such claim of waiver was raised below. More importantly, the Pennsylvania Supreme Court actually adjudicated and decided the constitutional issue raised by Fletcher on its merits. See Appendix at 25a (attached to Petition). Therefore, the waiver claim cannot be raised here. *Orr v. Orr*, 440 U.S. 268, 274, 99 S.Ct. 1102, 1109, 59 L.Ed. 2d 306 (1979).[1]

---

[1] Furthermore, the waiver claim makes no sense, because the challenged ruling was an order *in limine* opposed by the defense at trial; the defense's opposition and challenge to the ruling in a post-trial motion is the equivalent of objection.

To blunt the impact of the denial of Petitioner's right to present mitigating evidence, the Commonwealth mischaracterizes the scope of the order *in limine* that muzzled Fletcher in his testimony at the sentencing hearing. The Commonwealth claims that "Petitioner was entitled to testify to the applicability of aggravating and mitigating circumstances, including the circumstances of the offense. The Court did not prevent him from doing so; he was free to admit the murder but claim it arose from a non-drug motivation." Resp. Brief at p. 10. But the Commonwealth's gloss is at odds with the Court's actual ruling.

The breadth of the trial judge's order *in limine* is clear: In its May 17, 1993 Opinion, the Court ruled that it did not err in "forbidding the defendant from presenting evidence regarding his claim that this shooting occurred due to a gambling debt." Appendix at 66a (attached to Petition).[2] Denied an opportunity to testify that the shooting resulted from other circumstances, Fletcher was unable to dispute the prosecutor's contention that the shooting was drug-related. In its brief to this Court, the Commonwealth makes no mention of the trial judge's own characterization of the scope of his order and tries to recast the record so that the order *in limine* does not appear as restrictive as it actually was.

In forbidding Fletcher from testifying that his altercation with the decedent was not drug-related, the trial court prevented him from rebutting one of the two aggravating factors used to obtain the death sentence. Absent

---

[2] Defense counsel was also required to explain the trial court's order *in limine* to his client on the record, and explained that Fletcher would not be able to testify as to the circumstances of the offense. The Commonwealth attempts to argue that the trial court somehow contradicted or "corrected" counsel's explanation of its order, but the comments of the trial court cited by the Commonwealth say nothing of the kind. Resp. Brief at pp. 7-8.

that aggravating factor, Petitioner's death sentence cannot stand. Therefore, the constitutional error committed by the trial judge warrants this Court's review.

## II. FLETCHER PROPERLY RAISED THE CLAIM UNDER THE CONFRONTATION CLAUSE BELOW

Fletcher argued to the Pennsylvania Supreme Court that his rights were violated when the trial court admitted an alleged out-of-court statement of the decedent suggesting that Fletcher had a motive to kill him because the decedent had ingested cocaine belonging to Fletcher instead of selling it and giving the proceeds to Fletcher.[3] Second Appendix at 1a. In challenging the trial court's ruling, Fletcher cited *Commonwealth v. Tann*, 459 A.2d 322, 327 (Pa. 1983). Second Appendix at 2a. *Tann*, in turn, relies on *Commonwealth v. DuVal*, 307 A.2d 229, 232 (Pa. 1973), which invokes a long line of authority from this Court interpreting the Confrontation Clause. Among the authorities cited by *DuVal* are *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965); and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). The Court in *DuVal* explained that "the Sixth Amendment right to confront witnesses, made applicable to the states by the Fourteenth Amendment, . . . [is] violated by procedures which

---

[3] The Commonwealth points out that the issue was raised through a claim that counsel rendered ineffective assistance by failing to object to the evidence. The Pennsylvania Supreme Court, however, adjudicated the issue based on the merits of admitting the evidence, so the merits of the issue are properly before this Court. *Orr v. Orr*, 440 U.S. 268, 274, 99 S.Ct. 1102, 1109, 59 L.Ed. 2d 306 (1979).

permit [ ] the jury to learn the substances of uncrossexamined, extrajudicial statements of alleged co-felons." *Id.* at 232.

The issues raised and preserved by Fletcher's reference to *Tann* and, derivatively, to *DuVal* are precisely the same constitutional issues that Fletcher now raises in his petition to this Court. The Commonwealth's assertion that Fletcher waived those issues is therefore baseless.

Furthermore, the Commonwealth's suggestion that Fletcher's claim is based on law "handed down years after the supposed ineffectiveness took place" (citing *Lilly v. Virginia*, 527 U.S. 116 (1999)) is inaccurate. Resp. Brief at p. 12. Fletcher's Petition relies on well-established Confrontation Clause principles that have been firmly ensconced in this Court's jurisprudence since at least *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990). *See*, Petition at pp. 15, 19. As for the merits of the Confrontation Clause claim, Fletcher stands on his Petition.

JEROME J. SHESTACK*
JARETT B. DECKER
ALIZA R. KARETNICK
WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103-2097
(215) 977-2000

*Counsel for Petitioner, Anthony Fletcher*

**Counsel of Record*

**SECOND APPENDIX**

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

---

NO. 0141 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA
APPELLEE

VS.

ANTHONY FLETCHER
APPELLANT

ON APPEAL FROM THE JUDGMENT OF SENTENCE OF COURT OF COMMON PLEAS, PHILADELPHIA COUNTY NOS. 6001, 6003 OF MARCH TERM, 1992 DATED FEBRUARY 21, 1996

BRIEF AND RECORD FOR APPELLANT

* * *

## XVII. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO HEARSAY TESTIMONY REGARDING STATEMENTS MADE TO RONALD BROOKS BY THE DECEDENT DESCRIBING A MOTIVE FOR THE SHOOTING.

It is well-settled that when analyzing ineffective assistance of counsel claims, Pennsylvania Courts apply a three-pronged test: 1) whether the issue underlying a charge of ineffective assistance has arguable merit; and 2) whether the course selected by counsel had some reasonable basis designed to effectuate the client's interest; and 3) whether the defendant was actually prejudiced by the ineffectiveness. COMMONWEALTH VS. PIERCE, 515 Pa. 153, 527 A.2d 973 (Pa. 1987); COMMONWEALTH VS. DAVIS, 518 Pa. 77, 541 A.2d 315 (1988). A claim of ineffective assistance of counsel must be based on evidence and not merely unsupported allegation. COMMONWEALTH VS. BULLOCK, 415 A.2d 1240, 272 Pa. Super. 464 (Pa. Super. 1979). Thus, counsel has been held ineffective for failing to object to adverse hearsay testimony. COMMONWEALTH VS. TANN, 500 Pa. 593, 459 A.2d 322 (1983).

In the instant case, the commonwealth was allowed to cross-examine witness Ronald Brooks regarding a statement he allegedly gave to police. In that statement, he supposedly relate [sic] that the decedent told him that Mr. Fletcher has shot [sic] the deceased because he received from Mr. Fletcher a package of drugs but failed to account for the proceeds thereof. (N.T., 1/20/94, pp 21-24) Such testimony was clearly hearsay, but defense counsel did not object thereto.

This Failure was particularly onerous as it purported to supply motive for the shooting. Defense counsel's failure to object was not designed to effectuate his defendan's [sic] best interest, and actually served to his client's detriment.

* * *